

Office of the Legislative Auditor

State of Montana



Report to the Legislature

December 1994

Performance Audit Report

Hard Rock Mining Regulation

Reclamation Division

Department of State Lands

This report contains recommendations for improvement in procedures used by the Department of State Lands for permitting, monitoring, and enforcement of hard rock mining activity in Montana. The recommendations address:

- ▶ Strengthening bureau administration.
- ▶ Supporting and documenting permitting decision-making.
- ▶ Expanding mine inspections and follow-up actions.
- ▶ Establishing a comprehensive enforcement system.

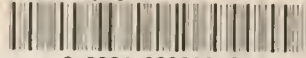
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December 1994

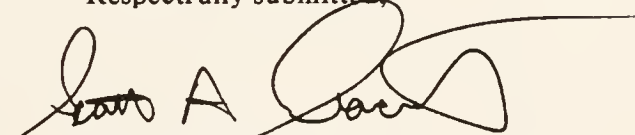
The Legislative Audit Committee
Of the Montana State Legislature

This is our performance audit of Hard Rock Mining Regulation. The Department of State Lands is responsible for hard rock mine regulation.

This report contains recommendation for improving administration of hard rock mine permitting, monitoring, and enforcement process. Responses from the Department of State Lands are contained at the end of the report.

We wish to express our appreciation to the department and the staff of the Reclamation Division for their cooperation and assistance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Scott A. Seacat', with a long horizontal line extending from the end of the signature.

Scott A. Seacat
Legislative Auditor



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Office of the Legislative Auditor

Performance Audit

Hard Rock Mining Regulation

Reclamation Division

Department of State Lands

Members of the audit staff involved in this audit were Glenn Jorgenson, Kent Rice, and Mike Wingard. Additional information on the audit can be obtained by contacting the Office of the Legislative Auditor at (406) 444-3122.

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Report Summary

Introduction

Senate Joint Resolution (SJR) 28, passed in 1993 by the 53rd Legislature, requested the Office of the Legislative Auditor (OLA) conduct a performance audit of the Hard Rock Bureau (HRB), Reclamation Division, Department of State Lands (DSL). The Reclamation Division is responsible for administering and enforcing Montana's mined land reclamation statutes and administrative rules. Our audit only reviewed HRB operations.

Our observations and reviews indicated HRB staff have a significant number of complex and varied tasks which they are involved in. Permitting, monitoring, and compliance enforcement makes up the framework of bureau activities, but does not illustrate the types and degree of staff involvement within each of those functions. Staff are required to analyze and comment on proposed and actual mining operations, conduct inspections, attend innumerable meetings and public hearings, and perform all these activities simultaneously for multiple projects in varying stages of completion and which have differing time deadlines. We recognize and acknowledge the HRB's recent efforts to address an increasingly complex and changing regulatory role. We believe a greater management effort should be made to define, monitor, and evaluate bureau activities.

Hard Rock Bureau Administration

Management Oversight of Staff's Daily and Procedural Activities Could be Improved

HRB's activities can be categorized into three fundamental activities: permitting, monitoring, and compliance enforcement. Each activity consists of a process or processes which HRB personnel utilize to undertake that activity. Management's role in these activities is basic. HRB management has not focused its attention on development of detailed, formal policies and procedures for all staff activities, or established comprehensive supervisory oversight to assure staff follow processes which meet management expectations.

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While we acknowledge the need for HRB management to allow technical staff to use their discretion and experience in addressing and solving problems within their area of expertise, we believe additional management involvement is necessary. Throughout our review, we identified deficiencies in management controls. The outcome of these deficiencies is that HRB's processes are not as effective as they could be for accomplishing their various activities and assuring compliance with applicable statutory responsibilities.

Bureau Management Information Needs to be Expanded

From the outset of the audit, we obtained interview information from HRB personnel, industry, and environmental representatives regarding concerns about staff turnover and number of personnel available to adequately address the bureau's responsibilities. When we attempted to evaluate the validity of these concerns, we found HRB does not routinely compile or analyze task-specific information regarding bureau activities. Workload data such as active applications, amendments, pending inspections, and status of ongoing enforcement activities is not in a format which allows easy or comprehensive analysis. Therefore, there is no detailed management information compiled or formal bureau analysis of the impacts of such personnel activities as completeness reviews, environmental assessment development, Interdisciplinary Team involvement, or mine monitoring, on the ability of existing personnel to accomplish all bureau requirements. As a result, we were unable to fully assess whether the number of personnel and/or workload negatively impacts the bureau's ability to perform its regulatory responsibilities.

By compiling and analyzing specific workload data such as determining the percentage or amount of time staff spend to complete bureau functions and tasks, (i.e., pre-application and completeness reviews, meetings, inspections, etc.) and examining corresponding personnel needs, we believe HRB can develop a proactive management tool which will assist in bureau administration.

HRB Communication/Coordination with the Water Quality Division Needs Review

Throughout the course of the HRB audit we received extensive comments about communication and coordination problems between HRB and DHES Water Quality Division (WQD) regarding permitting and monitoring of mines. During our audit, we examined the process/procedures used by the two agencies to coordinate mine regulation. Our review indicates only minimal coordination between the two agencies, and communication between the two entities is limited. Based on the existing Memorandum of Understanding (MOU) and liaison agreement, a more effective process should exist. There has been a lack of management emphasis on correcting the problems identified.

Another reason for deficiencies in communication and coordination between the agencies is language in the MOU and liaison contract is too general. DSL and DHES need to re-evaluate the liaison position and MOU to determine whether these agreements are the most effective method of achieving the interagency communication and coordination referred to in the Metal Mine Reclamation Act (MMRA) and Montana Environmental Policy Act (MEPA) statutes.

Permitting of Hard Rock Mines

HRB's Adequacy Review Period has Extended Beyond the Statutory Time Frame for Some Projects

Section 82-4-337, MCA, requires HRB to follow specific time frames in issuing an operating permit. The initial application completeness review must be done within 60 days of application receipt. Subsequent completeness reviews must be done within 30 days of receipt of the deficiency response. Should HRB not comply with the statutory time frames, the application is considered complete. For the permit applications in our review, HRB met mandated completeness review time frames.

Upon determination of application completeness by HRB, the bureau has another 30 days to review adequacy of the proposed reclamation plan and plan of operations. It is during this time period when the bureau formally determines what degree of

Report Summary

environmental review (Environmental Analysis (EA) or Environmental Impact Statement (EIS)) is necessary to address the actual and potential environmental impacts of the proposed mine. If HRB determines additional time is needed to conduct application adequacy, the bureau and applicant can negotiate to extend the period by not more than 365 days. Failure by the HRB to act upon a complete application within the designated time frames constitutes application approval and a permit must be issued upon receipt of the performance bond. For the files we reviewed all permits were issued after HRB acted on the complete application.

Legislative Changes may be Needed

We did identify instances where HRB exceeded mandated adequacy review time frames due to the amount of time needed to complete the review. Of the 16 permitting mine files reviewed, we noted two instances of the adequacy review period exceeding the statutory time frame. We also noted one mine which was not issued a permit for 21 months after the HRB determination of application completeness. Of the three applications currently in the HRB adequacy process, two have exceeded the statutory time frame and the third may also exceed the time frame.

In cases where HRB could not determine adequacy within the additional 365-day time frame, the department and applicant negotiated beyond statutory authority rather than deny the permit and end the entire process. Even though HRB may have received applicant approval to extend the time needed for adequacy determination, the HRB does not have the authority to extend this period beyond the additional 365 days prescribed by statute. There are two options available to the HRB. One is to comply with current statutes by approving or denying permits within the additional 365-day time frame. The other option is to recognize the necessity of the current process, the complexity of review, and increased interest in current mining activity and seek legislative authority to allow negotiation of a specific extension of the 365-day time frame.

HRB Needs to Improve Procedures for Assuring Statutory Compliance with Permitting-Related Statutes

We identified a number of concerns related to the HRB's permitting process in regard to compliance with the MMRA. For example, several sections of the MMRA require the applicant to supply information to be included in the operating permit applications. Our audit also determined HRB does not always develop or maintain documentation of compliance with MMRA provisions. Several files lacked detail necessary to demonstrate MMRA compliance.

All of the reasons for the various noncompliances suggest the need for increased management oversight. Through staff training, more detailed procedures, and documentation demonstrating compliance, HRB management can reduce noncompliance with mine permitting statutes.

Formal Requirements Should be Established for the Documentation and Support of HRB's Permitting Decisions

During our review, we found there is no formal method employed by the bureau to ensure all phases of the process are properly completed, and that permits issued address all identified impacts. There are several decision-making points within permitting. These decision-making points and subsequent HRB decisions are critical to the final outcomes of the permitting process. Not documenting and supporting how those decisions are made reduces the public's ability to gain a clear understanding of the permitting process, and appears to contradict the implied intent of the MMRA and MEPA.

During our audit period, HRB did not have a system in place to comprehensively evaluate completeness and adequacy review outcomes to ensure those outcomes were appropriately addressed prior to permit issuance. For the examples noted in our review, it appears some completeness and adequacy findings were either overlooked or the decision-making process was not satisfactorily documented to support the decision.

Based upon our findings, we do not believe the bureau's existing procedures for documenting the basis for its decisions or the current managerial oversight of the process ensure detailed information is provided. For HRB to fully demonstrate its compliance with the intent of constitutional and statutory

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mandates, we believe it is necessary to have permitting procedures and documentation standards which demonstrate and assure compliance. To have assurance of consistency, the HRB must have management oversight which emphasizes a consistent documented procedure and which evaluates not only the outcomes, but the actual permitting process itself.

Monitoring of Mines

Lack of Permit Stipulation Detail Creates Difficulties in Monitoring

The HRB is responsible for monitoring requirements of each operating permit until mining activity ceases and reclamation is complete. Operating permit conditions are developed to mitigate effects or monitor activities to help resolve potential compliance issues. While operating permit stipulations are developed prior to the monitoring process, permittee compliance with stipulations often becomes the primary basis for future monitoring efforts. Although the language used for some permit stipulations is detailed in terms of specific parameters and completion dates, we noted a significant amount of generality in many stipulations. Specifically, we observed stipulations which did not include time frames, methodologies, or detailed courses of action.

Based upon our file reviews and observations, as well as interviews with HRB personnel and industry representatives, lack of clearly specified permit stipulations has caused miscommunication, violations of intended operating or reclamation requirements, and difficulty in attaining compliance and enforcement. The department agrees the current process for reviewing permit stipulations can be improved and stated an informal checklist of content criteria will be used in the future. We believe this type of stipulation review should not only be used, but formalized to assure consistency of usage.

HRB Inspection Procedures

We reviewed operating and reclamation plans, permit stipulations, prior inspection reports, annual reports, and other documentation to determine what types of information HRB personnel could obtain/analyze prior to conducting mine site inspections. Based on our review, it appears inspection preparation varies from person to person. However, in most files, we could not readily identify any pattern of formal inspection preparation. There is little or no documentation (such as compiling a checklist/questions to be used during inspections) to demonstrate HRB personnel review permit stipulations, operating/reclamation plan requirements, or past inspection reports prior to conducting inspections. In addition, our observations of inspection activities and interviews confirmed there is minimal review of prior inspection reports and/or permit-related documentation before personnel conduct on-site inspections.

Section 82-4-341(1), MCA, requires each permitted mine to be inspected at least annually. However, as noted by HRB management and our review, several mines did not receive any documented annual inspections during one or more of the past five years. We noted 7 of the 23 mine files reviewed did not contain documentation of at least one inspection per year. We also noted two other mines where inspection frequency did not appear to comply with HRB policy. In addition, we identified mines where the permittee's plans and/or permit stipulations indicated earlier and/or more frequent inspections, yet these did not occur.

HRB inspection files and observations of on-site mine inspections indicate the HRB inspection function is based upon personnel availability, individual personnel interest, and phase of mine operations. While there are potential benefits to be derived from having varying specialists review mine operations, the HRB does not have a policy or process to assure all applicable specialists inspect the site in the appropriate order. The HRB also does not conduct regularly scheduled comprehensive inspections which assure review of all aspects of the operating/reclamation plans and permit stipulations.

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In addition, when there are multiple site visits during the year(s) by various personnel, the timing of visits does not always appear to correspond with mining operations. While site visits by a reclamation specialist during mine development could potentially improve topsoil salvage efforts by the permittee, inspections/visits by an engineer during mine development could be critical to the entire mine operation. At present there is no HRB policy or process to assure mines are inspected in a time/specialty sequence which consistently utilizes HRB expertise at the appropriate time.

While we recognize HRB has multiple priorities and a finite number of personnel to address these priorities, use of comprehensive inspections and/or timing visits so applicable personnel are on-site during the appropriate phases of mine operations should be considered when developing an inspection program. If available staffing resources are a problem, it is even more important to utilize available staff effectively. Staff should prepare for inspection visits to achieve the most effective use of time. A formal risk analysis process should be developed to prioritize inspections, and time on-site visits to correspond with mining operations. This would increase regulatory effectiveness and help demonstrate efficiency to the permittee and general public.

Documentation of Inspections is Inconsistent and Often Untimely

We noted significant variances and inconsistencies in documentation of inspections and utilization of inspection forms by HRB personnel. Inspections are documented differently by HRB personnel. Another concern noted with inspection report documentation was noncompliance with HRB policy regarding completion of inspection reports. Reports were to be completed within seven days of performing the inspection. We noted 15 of 23 mines (65%) had at least one inspection report signed more than seven days after the inspection date. We also noted inspection reports without signatures and/or dates of completion.

During the monitoring review, we noted HRB personnel do not always document on-site visits, and in other instances have not sent inspection results to the applicable mining company. Additionally, based upon our interviews with mining company

representatives, there is a perception of inconsistency in how inspection results are communicated to them.

The actual and potential effect of either not documenting on-site visits or not communicating results to the applicable parties heightens the mining industry's concerns about HRB inconsistency regarding inspections. Inconsistent inspection reports, reports lacking detail, or failure to send reports may result in miscommunication of findings. Currently, there is no active management oversight over how inspections are conducted, documented, communicated, or followed up on. Thus, there is no assurance personnel have a consistent approach to communication of inspections.

Inspection Reports Often Lack Documentation of Required Follow-Up Activity

During review of inspection reports, we identified potential and actual noncompliance issues noted by HRB personnel which appeared to require follow-up. We then reviewed subsequent documentation to determine what actions were taken. Of the 23 mine files reviewed, 14 files (61%) contained inspection reports which lacked documentation of follow-up, yet had findings either recommending or implying follow-up.

At present, management has neither developed guidelines for personnel to follow nor implemented a formal tracking system to monitor necessary follow-up. HRB personnel indicated they do not regularly review prior inspection reports to ensure issues from past inspections are re-examined, instead they rely on discussions with other personnel to make follow-up determinations. However, based upon our review, consistent follow-up on issues noted in prior inspections does not occur.

Not All Operator- Generated Monitoring Reports are Reviewed by HRB in a Comprehen- sive or Timely Manner

Permits require operator submission of data and/or reports regarding mine operations, many of which are reclamation or environmentally oriented. Based upon our review, not all data and information is reviewed by HRB in a manner which provides assurance of comprehensive or timely review. We noted several instances where it appears HRB did not conduct sufficient evaluations of submitted data. There are numerous other instances of permittees submitting required data up to a

Report Summary

year late, with no apparent awareness by the HRB that data was missing.

Because HRB personnel do not require/review data and information submissions in a timely manner, noncompliances and violations have gone and may continue to go unnoticed. We believe HRB management should evaluate current procedures used to receive and review operator-submitted data to assure a comprehensive and timely review, as well as to assure operators are complying with all permit requirements.

HRB Needs to Increase the Effectiveness of its Annual Mine Report Monitoring Process

The MMRA requires operating permit holders to submit annual reports of mining activities. During our review we identified repeated instances where annual reports were missing, required information was not submitted, or the annual reports were submitted late. In addition, we noted instances where HRB follow-up on this information appeared to be indicated, but was not initiated.

We believe HRB needs to increase the effectiveness of its current annual report monitoring process. HRB should increase review of annual reports and conduct timely follow-up with mining companies to ensure all required and necessary information is submitted. The information submitted in annual reports should be used to properly enforce MMRA statutes, operating and reclamation plans, and permit stipulations.

Enforcement of Operating Permit Requirements

Timeliness of HRB's Enforcement Process Should be Improved

Throughout the review of HRB enforcement actions, we noted significant delays between when a potential noncompliance activity was first noted and when the bureau formally acted on an issue. We determined 15 percent of the notices of noncompliance (NONs) processed between January 1989 and July 1994 were not issued for at least 90 days following discovery of a violation, and another 50 percent of the NONs

were issued between 30 and 90 days following violation discovery. In addition to delays, we noted substantial time lapses between when a NON was issued and when the permittee was issued a penalty notification. Between January 1989 and July 1994, 38 percent of penalty notifications were issued more than a year after the NON was sent. Another 28 percent of the penalty notifications were sent between 90 and 180 days following NON issuance.

A compliance enforcement process should be established which ensures a timely, comprehensive, and consistent approach to permittee compliance. HRB should place more emphasis on the compliance enforcement process by revising existing policies and procedures, improving action relative to issuance of NONs and penalty assessments, and examining the role of the department's legal staff.

Abatement Follow-Up Actions are not Always Timely or Documented According to Policy

Each NON issued by the HRB outlines specific abatement procedures and time frames which permittees are required to meet to get back into compliance with operating permit requirements. During review of HRB monitoring activities as well as NONs issued to permit holders over the past five years, we identified what the required abatements were, then determined when the next formal inspection was done which could have verified the abatement. We noted six NONs issued in the past five years which were not formally followed up on within or near the abatement deadline as outlined in HRB policy. In addition, of the 42 NONs issued by HRB in the past five years at least 50 percent of the abatement follow-ups were not specifically documented in the compliance file as specified by policy.

As noted previously, we believe timing and frequency of mine inspections needs more emphasis by HRB. This is reinforced by our findings regarding lack of timely, formal HRB follow-up to the NON abatement requirements. If an HRB inspector determines there is a permit violation worthy of issuing a NON and specifying abatement requirements, they should also formally insure the permittee has complied with those requirements.

Report Summary

HRB Lacks an Accurate, Comprehensive, and Easily Accessible System for Tracking Compliance Enforcement Actions

At present, multiple sources of information regarding HRB compliance enforcement actions exist. However, our review of these information sources indicated none contained all the data needed to fully determine the bureau's enforcement activities. Currently, neither HRB nor department legal staff have an accurate, comprehensive, or easily accessible system for reviewing the bureau's compliance enforcement activities. Based upon our review, there are numerous instances of NONs not readily followed up on after issuance, and delays in notifying companies of penalties. We believe lack of follow-up was partially caused by lack of a comprehensive tracking system as well as HRB failure to consistently monitor compliance enforcement after NON issuance.

Our audit evidence suggests monitoring/tracking of enforcement activities is not a priority of either HRB or legal staff. We believe HRB and legal staff need to analyze and evaluate the current priority given to compliance enforcement tracking and create a system which is accurate and comprehensive. The system should be used to trigger responsive department actions when either HRB, legal staff, or permittee activity is required.

Overall HRB Compliance Enforcement Philosophy Should be Revised to Provide a Forceful and Consistent Approach

During review of the HRB monitoring and compliance enforcement processes, we noted several instances where HRB personnel either did not issue NONs for problems which appeared to be a noncompliance, or recommended penalty amounts lower than what the noncompliance may have warranted based on HRB penalty calculation methodologies. During review of NONs, we also looked at reasonableness of penalty determinations and subsequent penalty amounts paid. We noted only 34 of the 42 NONs issued in the past five years contained penalty calculation forms, and 29 of the 34 calculation forms included penalty calculation rationale. Without complete documentation of penalty determinations, we were unable to fully assess the reasonableness of the penalty determination process. However, we did identify examples of penalties being reduced with little or no documentation/support for the reduction.

We believe the HRB should have relatively specific guidelines regarding what is and is not a problem/issue worthy of a NON and how much the penalty should be. At present, there are no administrative rules or formal policies indicating how HRB personnel should determine whether to issue a NON. In addition, while existing NON policy states a penalty may be reduced, there are no formal definitions of "unreasonable" or "substantial injustice" which are the terms HRB uses to determine penalty reductions. Also, the methodology for achieving any reduction has not been determined.

Chapter I

Introduction

Introduction

Senate Joint Resolution (SJR) 28, passed in 1993 by the 53rd Legislature, requested the Office of the Legislative Auditor (OLA) conduct a performance audit of the Hard Rock Bureau (HRB), Reclamation Division, Department of State Lands. The audit is to include an evaluation of the entire hard-rock mine permitting process, including but not limited to the following issues:

- permitting (time frames, permit application completeness review, and permit revision and amendment review);
- permit monitoring; and
- permit enforcement.

In addition, SJR 28 requested the OLA to include a detailed analysis of certain HRB functions in its scheduled financial-compliance audit. Results of that review will be included in the financial-compliance audit report covering the two fiscal years ended June 30, 1994.

Audit Objectives

In response to SJR 28, our performance audit addressed the following objectives:

1. To determine whether the number of HRB personnel and/or workload negatively impacts the bureau's ability to perform its regulatory responsibilities.
2. To evaluate mine permitting activity.
3. To determine the consistency and effectiveness of current procedures and activities for monitoring permitted mining operations.
4. To review and evaluate HRB's compliance enforcement process to assess whether the process is an effective tool for ensuring compliance with applicable statutes.

Chapter I

Introduction

Audit Scope and Methodology

The audit was conducted in accordance with government auditing standards for performance audits. The audit provides information on how hard-rock mine permitting, monitoring, and compliance enforcement processes operate and what factors may affect or impact these functions.

We assessed whether the number of HRB personnel is a factor in meeting statutory time frames, and whether there is comprehensive, timely monitoring of mine operations. We profiled the length and complexity of the permitting process by reviewing permit files for 9 of the 13 operating permits issued between January 1, 1989 and December 31, 1993. In addition, we reviewed a judgmental sample of 14 of the 43 operating permit amendments issued during this same time period.

We examined the bureau's monitoring of hard-rock mining to determine the extent, consistency, and quality of its inspection process. This included review of inspection files, observation of inspections, interviews with mining company personnel, and analyses of both bureau and other agency procedures for monitoring hard-rock mining activities. We reviewed inspection reports and other monitoring documentation compiled by the HRB during our five year audit period for 23 mines. In addition, we reviewed and evaluated the process used by HRB to inspect mine reclamation activities and release performance bonds.

We reviewed the bureau's enforcement process to gain a historical perspective of the bureau's regulatory involvement. We identified and reviewed HRB compliance actions over the past five years to determine past and current practices regarding enforcement of operating permit requirements.

There were bureau functions we did not include in the audit scope - regulation of mining exploration and small miners, and activities related to controls over environmental reviews. These functions were not emphasized by SJR 28.

Data Limitations

Government auditing standards require disclosure of any constraints imposed on the audit because of data limitations. We attempted to examine personnel utilization and turnover as they relate to timeliness of reviews and inspections. We were unable to complete an analysis due to the limited amount and/or type of management information generated and analyzed by the HRB. This impacted our ability to address our first audit objective of determining workload impact on the bureau's regulatory responsibilities.

These same data limitations adversely affect management of bureau activities. Types of limited or missing information included detailed time sheets, workload data, and estimates of time necessary to complete specific tasks. This data limitation and its effects are discussed in detail in Chapter III.

Issues for Further Study

During our review, we identified several bureau activities which warrant further study. These include the administration/monitoring of exploration and small miners, as well as controls over environmental review activity. This audit work was not within the scope of SJR 28. We believe further study is warranted for several reasons.

Currently, there are approximately 500 exploration projects operating under about 200 exploration licenses. Only one license is required for each company or individual. There can be numerous projects under each exploration license. However, each project must be reviewed and approved by HRB, and bonded to ensure performance of all requirements. The potential for environmental damage from mining exploration activities (while smaller) is similar to impacts resulting from hard-rock mining activity. Further study could include examination of licensing procedures, monitoring activity, and reclamation efforts.

A small miner is defined in statute as a person or company engaged in the business of mining or reprocessing of tailings or waste materials which does not remove material in excess of

Chapter I

Introduction

36,500 tons per year and does not disturb and leave unreclaimed more than five acres of land. With the exception of those using cyanide, small miners are exempt from most of the requirements of operating permit statutes. A small miner must sign an affidavit stating the operator will stay within the requirements and conditions of the "exclusion." There are approximately 1,000 small miner exclusions monitored by the HRB. Currently, there are 2.5 FTE responsible for monitoring all small miner activity. In addition, there are approximately 20 small miners using cyanide in their operations. As with exploration activities, there is potential for environmental impact. Future audit work could include review of procedures used to ensure small miner activity is comprehensively monitored.

Environmental review activities include hiring and managing environmental impact statement (EIS) contractors, communicating and coordinating with interested and cooperating parties, writing and editing environmental documents, and overall EIS project management. Currently, three FTE positions within HRB are responsible for coordinating EIS environmental review activity. Mining companies pay EIS costs and project budgets may range from \$100,000 to \$1 million. Changes of scope in the EIS can create additional costs for mining companies as well as delays in the permitting process. If further work is conducted, we would examine how EIS contractors are hired, and identify and evaluate controls over the administration and payment of the contractors.

Report Organization

This report is organized according to the sequential process used by the Hard Rock Bureau to issue and monitor operating permits. Chapter II provides general background on bureau operations. In Chapter III, we discuss management information and communication/coordination with the Water Quality Division, Department of Health and Environmental Sciences. Chapter IV describes our review of the permitting process and summarizes our findings and recommendations. We describe the monitoring process in Chapter V. In Chapter VI, we discuss compliance enforcement activities conducted by the bureau.

Chapter II

Background

Introduction

The State Board of Land Commissioners delegated its authority for administering hard-rock and placer mining laws in Montana to the Department of State Lands (DSL). The Reclamation Division is responsible for administering and enforcing Montana's mined land reclamation statutes and administrative rules. This responsibility includes regulating all mining activities on state, federal, and private lands (excluding Indian Reservation and Tribal lands), and reclaiming abandoned mines. Four bureaus within the division administer various programs to meet statutory requirements:

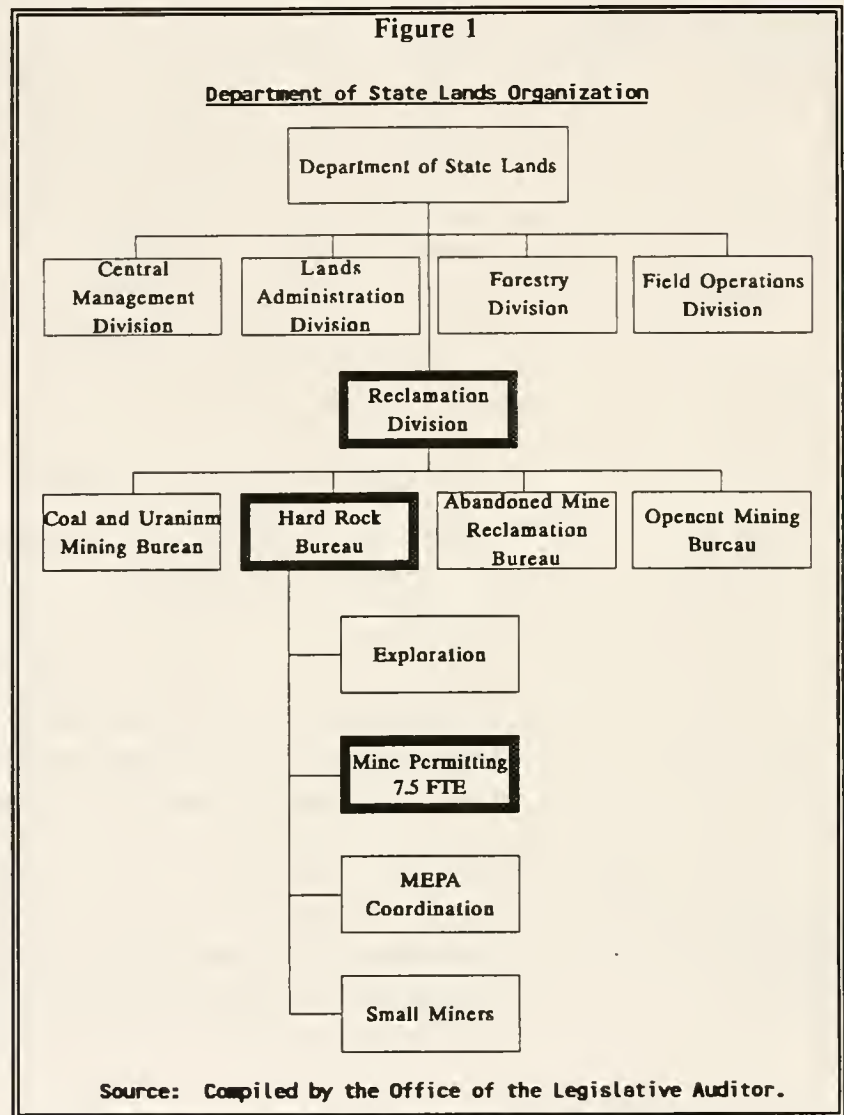
- Coal and Uranium Mining Bureau,
- Hard Rock Bureau,
- Abandoned Mine Reclamation Bureau, and
- Opencut Mining Bureau.

Our audit only reviewed Hard Rock Bureau (HRB) operations. Hard-rock mining includes all minerals except oil, gas, bentonite, clay, sand, gravel, phosphate, coal, and uranium. This includes minerals such as gold, silver, copper, platinum, palladium, topsoil, limestone, talc, and other precious and industrial minerals.

Department Organization

The following figure shows DSL's current organization and illustrates the components of the HRB where we focused our audit examination.

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HRB is divided into four sections. Each section is responsible for certain aspects of exploration and hard-rock mine regulation. There are 7.5 FTE within Mine Permitting, including a supervisor, various specialists, and a half-time water quality liaison. The Exploration, MEPA Coordination, and Small Miners Sections have 2 FTE, 3 FTE, and 2.5 FTE respectively. The remaining FTE include the bureau chief, 1.43 FTE administrative assistants, and a 0.5 FTE attorney specialist. As of September 1994, all positions were filled.

HRB Funding

HRB is currently funded 100 percent with State Special Revenue funds. The primary revenue source is the Reclamation and Development Account. Reclamation and Development Account funds are derived from interest income of the Resource Indemnity Trust (RIT) Fund. RIT funds are generated from annual taxes assessed against persons engaged in or carrying on the business of mining, extracting, or producing a mineral.

Table 1 illustrates HRB expenditures for program operations for fiscal years 1990-91 through 1993-94.

Table 1

Hard Rock Bureau Expenditures
(Program Operations)

	Actual FY 1990-91	Actual FY 1991-92	Actual FY 1992-93	Actual FY 1993-94
Personal Services	\$338,106	\$434,944	\$551,901	\$509,454
Operating Expenses	141,678	118,427	80,242	151,226
Equipment	19,794	55,099	22,606	26,431
TOTAL	<u>\$499,578</u>	<u>\$608,470</u>	<u>\$654,749</u>	<u>\$687,111</u>

Source: Statewide Budgeting and Accounting System records.

Other bureau revenue includes mining fees, penalties, bond forfeitures, and environmental impact statement (EIS) fees. The application and annual fee for operating a hard-rock mine in Montana is \$25 and has not been changed since its implementation in 1971. Fees go into the hard-rock mining and reclamation account which has an account balance of approximately \$185,000. Fees are not used to help defray costs of processing applications or annual reports. By statute, moneys in the account must be expended for research, reclamation, and revegetation of land and rehabilitation of water affected by mining operations. Bond forfeiture moneys are dedicated to reclamation of specific mine sites by the Montana Metal Mine Reclamation Act (MMRA). These moneys are collected by HRB when a mine operator fails to fulfill reclamation obligations. The Montana Environmental Policy Act authorizes a state agency to assess a fee if an EIS costing over \$2,500 is necessary for reviewing an

Chapter II Background

application for a license or permit. These other revenues are earmarked and are not available to the HRB for program expenses. The following table shows total expenditures and sources for these earmarked accounts for the past four fiscal years.

Table 2

**Hard Rock Bureau Sources of Expenditures
(MEPA and Reclamation Funds)**

	<u>Actual FY 1990-91</u>	<u>Actual FY 1991-92</u>	<u>Actual FY 1992-93</u>	<u>Actual FY 1993-94</u>
MEPA Funds	\$ 978,978	\$448,046	\$417,979	\$1,012,361
Reclamation Funds				
Bond Forfeitures	51,435	11,490	140,778	22,867
Fees & Penalties	14,864	0	14,868	9,947
TOTAL	<u>\$1,045,277</u>	<u>\$459,536</u>	<u>\$573,625</u>	<u>\$1,045,175</u>

Source: SBAS records.

Metal Mine Reclamation Act and Montana Environmental Policy Act

The HRB operates under Title 82, chapter 4, part 3, which is commonly referred to as the MMRA, and Title 75, chapter 1, parts 1 and 2, the Montana Environmental Policy Act (MEPA). In addition, the Montana Constitution contains requirements related to mining and reclamation. HRB is further governed by administrative rules. In general, the MMRA provides guidelines for permitting, monitoring, and reclaiming mining activity in Montana. In addition, the MMRA provides enforcement standards to assure mining activities comply with MMRA requirements.

The MMRA applies to exploration and extraction of all minerals and materials except oil, gas, bentonite, clay, sand, gravel, phosphate, coal, and uranium. These exceptions are administered by other DSL bureaus or state agencies under separate statutes. According to the MMRA, extraction of minerals by mining is a basic and essential activity which makes an important contribution to the economy of Montana. At the same time, the purpose of the MMRA is to provide the

usefulness, productivity, and scenic values of all lands and surface waters involved in exploration and mining receive the greatest reasonable degree of protection and reclamation to beneficial use.

Article IX, section 1, Montana Constitution, requires the environment to be protected from degradation and prevention of unreasonable depletion and degradation of natural resources. Section 2 of the Article requires all land disturbed by natural resource extraction to be reclaimed.

The purpose of MEPA is to encourage productive and enjoyable harmony between man and the environment, to prevent or eliminate damage to the environment, and to improve the understanding of ecological systems and natural resources important to Montana. Mining projects on federal land must also meet the requirements of the National Environmental Protection Act (NEPA). NEPA has a similar purpose as MEPA, only on a national level. MEPA/NEPA statutes require, among other things, a detailed statement on the environmental impact of major actions of government entities significantly affecting the quality of the human environment. HRB complies with MEPA statutes by completing an environmental review of each proposed action. Federal agencies are responsible for assuring compliance with NEPA statutes.

The following sections describe the various phases HRB uses to permit and monitor mining activity and to enforce compliance with MMRA, MEPA, and permit requirements.

Mine Permitting

The MMRA states, "A person may not engage in mining, ore processing, or reprocessing of tailings or waste material, construct or operate a hard-rock mill, use cyanide ore-processing reagents, or disturb land in anticipation of those activities without first obtaining an operating permit." The fee for obtaining an operating permit is \$25. An operating permit allows an individual or company to conduct mining activities within Montana. Each operating permit must include an operating and reclamation plan which complies with the MMRA and demon-

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strates protection of the environment. Applicants submit an application to the HRB, which then proceeds through several phases of review in order for the HRB to make a recommendation to approve or deny the operating permit. As of September 1994, there were 87 active mine operating permits in Montana. HRB issued 17 operating permits since January 1, 1989. Appendix B shows the locations of some of the larger permitted and proposed operations.

Other Agency Involvement

In addition to a mine operating permit, large scale mine operators often must obtain various other permits, based upon the size, location, and complexity of their operations. In nearly all circumstances, the permittee must also get permit(s) from the USFS (United States Forest Service) or BLM (Bureau of Land Management), depending upon the proposed mine's location. In addition, the permittee must often obtain permits from the Department of Health and Environmental Sciences' Water Quality Division (WQD) and/or Air Quality Division. HRB and WQD share one FTE position. This position acts as a liaison between the bureau and division and is responsible for reviewing/investigating permit applications as well as monitoring mining operations.

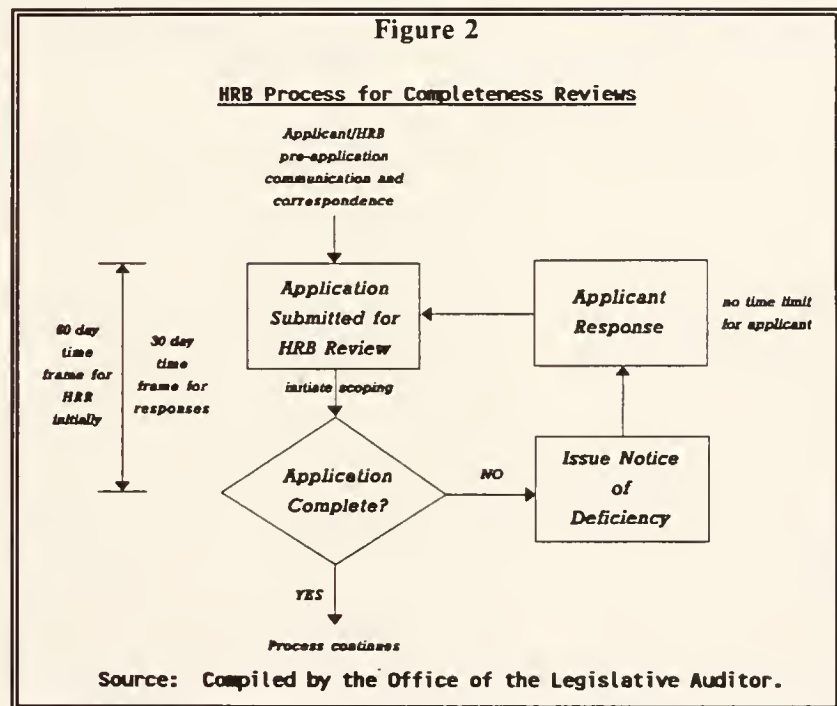
If wetlands are involved in mine operations, the Environmental Protection Agency (EPA) and the U.S. Corp of Engineers may become involved in the review. The United States Fish and Wildlife Service may also become involved if endangered species may be impacted by a proposed action.

Additionally, there may be involvement by the State Historical Preservation Office, Montana Department of Fish, Wildlife, and Parks, Department of Natural Resources and Conservation, Hard Rock Mining Impact Board, and local conservation districts.

Several agencies conduct monitoring and enforcement activities separately from HRB activities. The BLM, USFS, and DHES, as well as other agencies, conduct their own monitoring of mining operations. The results of these monitoring efforts are generally shared among the involved agencies. For projects where DSL

and another agency have joint responsibilities related to mining operations, a memorandum of understanding (MOU) is usually entered into between DSL and the state or federal agency. MOUs are developed in order to clarify agencies' roles and help increase efficiency and effectiveness. An MOU describes agency responsibilities and provides details on specific procedures such as plan reviews, environmental analysis, bonding, inspections, and overall communication and coordination. HRB also has overall MOUs with the WQD, USFS, and BLM.

Figure 2 shows the first phase in the permitting process.



Pre-application Communication

Prior to receiving an application for an operating permit, an individual or company may contact the HRB to obtain input on application requirements. HRB will assist individuals and companies in determining what site-specific information is required for the permitting process. For example, HRB provides input on the type and amount of baseline data required to provide adequate information for proper environmental review.

Chapter II Background

Completeness Review

The first step in the permitting process is to submit an application for an operating permit. An application consists of: 1) environmental baseline data; 2) construction and operating plan; 3) reclamation plan; 4) monitoring plan; and 5) contingency plan. HRB personnel review submitted applications to determine completeness. For example, hydrology personnel review proposed plans for erosion control measures and engineers review proposed impoundment designs. An application is considered complete by HRB when sufficient information is received addressing potentially affected resources, plans, applicable laws and rules. Application completeness also includes a determination of whether plans will adequately minimize the environmental effects of the proposed activities.

HRB has 60 days to determine initial application completeness. HRB must respond within this time frame or, according to statute, a permit must be issued upon receipt of the required bond. If an application is determined to be incomplete, a deficiency letter is issued. This notice contains questions about the proposed plans and/or requests additional information. The applicant may take as much time as needed to prepare a response. Once HRB receives the applicant's formal response to the first deficiency letter, the bureau has another 30 days in which to again determine completeness. HRB has to address this response within the 30 days or a permit must be issued after receiving the bond. If the application is still deemed incomplete, another deficiency letter is issued and another 30 day time period starts when the applicant responds to the notice. This process continues until the application is determined complete by HRB. The completeness review process may take anywhere from two months to over a year to complete.

Environmental Review

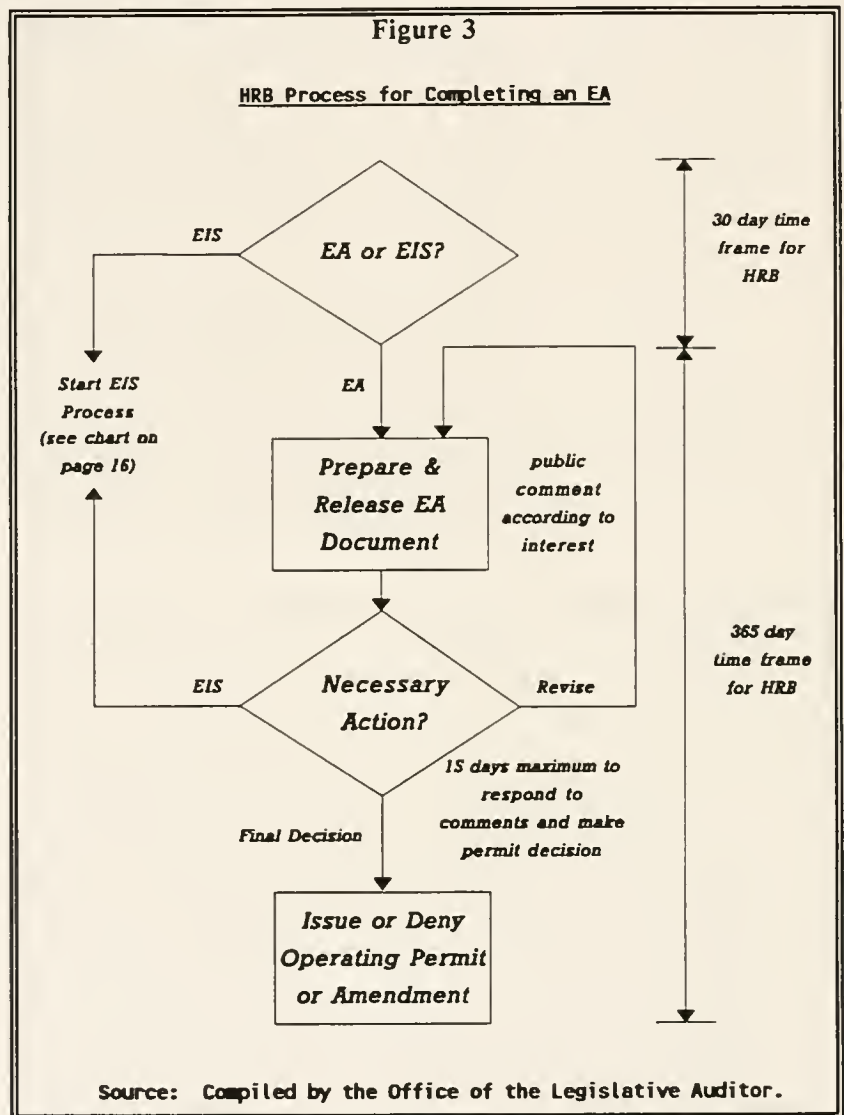
Upon determination of completeness, MEPA requires HRB to determine whether to complete an environmental assessment (EA) or an environmental impact statement (EIS). The EA and EIS are formal documents describing a proposed action and its effects on the environment. The EIS is typically more comprehensive and provides an in-depth discussion of specific issues

and cumulative effects of the proposed action on the natural and human environment. An EIS is required if an impact can or will have a significant adverse effect on the environment. For the 16 mine files we reviewed, 21 EAs and 2 EISs were completed for the operating permit and amendment applications submitted to HRB during the period of review.

The MMRA requires HRB to determine the adequacy of proposed operating and reclamation plans within certain time frames. HRB uses the environmental review process as a method for determining adequacy. Initially, HRB has 30 days to determine adequacy. If HRB determines additional time is needed, it can negotiate an extension with the applicant. The time frame cannot be extended beyond an additional 365 days.

Environmental Assessment

The following figure shows the EA portion of the permitting process.



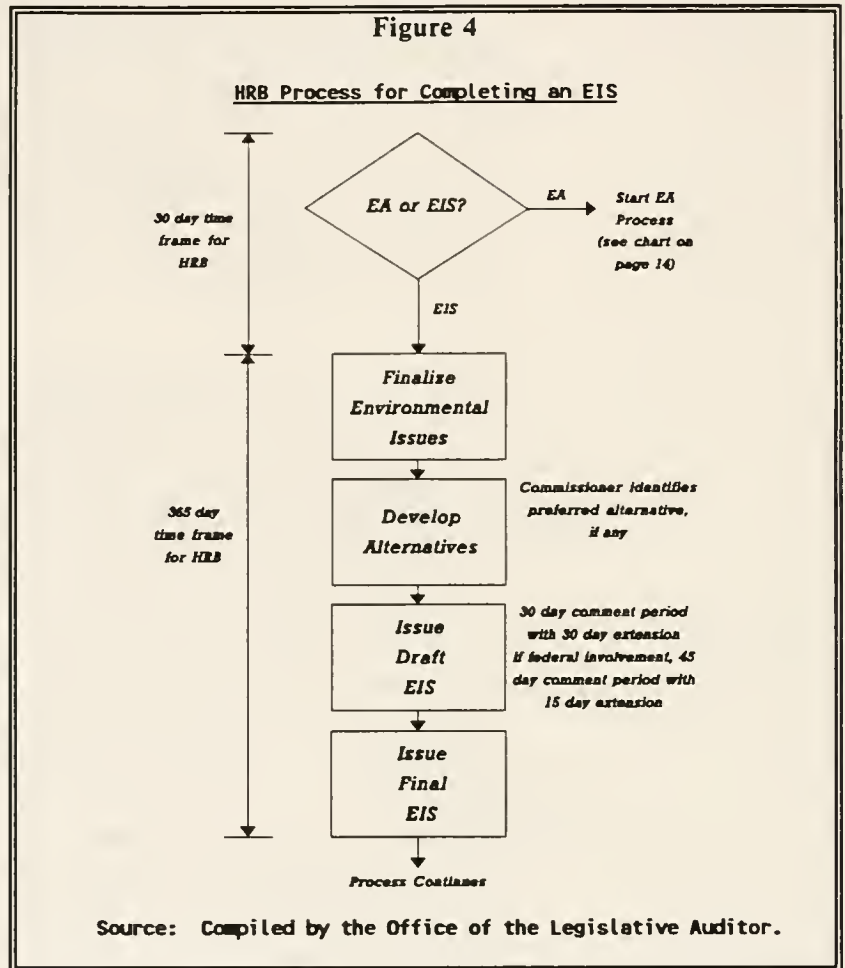
The level of analysis in an EA will vary with the complexity of the proposed mining action. There are three types of EAs compiled by HRB. The first is the checklist EA. The checklist EA is completed for routine actions with limited environmental impact and little or no public interest. The second type of EA is the standard EA. This document describes a proposed action and its effects on the environment. Finally, when a proposed action might normally require an EIS, but HRB determines environmental effects can be minimized, a mitigated EA is completed. The analysis, format, and content of a mitigated EA are more

substantial than the checklist and standard EAs. A mitigated EA generally provides changes in project design and/or imposes controls which mitigate effects below the "level of significance." The phrase "level of significance" is a judgmental determination made by HRB. Transporting workers to and from work and installing muffling instruments on equipment near wilderness areas are examples of mitigation used on permit applications approved by the HRB.

EA work is generally completed by bureau personnel. Time frames to complete an EA vary depending on the type of EA compiled and amount of public interest. For example, we noted some checklist EAs may take less than one day to complete. Standard EAs completed by HRB for several mines we reviewed took about two months to complete, whereas the mitigated EA for another mine took almost a year and a half to complete. An EA is a public document and may be inspected upon request. HRB is responsible for adjusting the amount of opportunity for public review to match the level of public interest. Administrative rules require a public comment period for mitigated EAs, including a public meeting. After the public comment period, HRB responds to substantive comments. HRB must then make a permit decision, issue a revised EA document to adequately address issues, or require an EIS.

Environmental Impact Statement

Figure 4 shows the process used by the HRB when an EIS is deemed necessary.



The first step in the EIS process is called "scoping." Generally, scoping is conducted concurrently with the completeness review. Affected agencies conduct scoping to identify potential environmental issues they may have. Alternatives to actions proposed in the application which would resolve significant issues are then developed. A draft environmental impact statement (DEIS) is then prepared and submitted to the Commissioner of State Lands. The commissioner identifies DSL's preferred alternative, if one exists. The DEIS is then issued. According to administrative rules, a 30 day public comment period on the DEIS begins upon issuance. The comment period can be extended 30 more days if the amount of public comment makes it necessary. If there are federal agencies involved in the process, the comment period is 45 days with a potential 15 day extension if needed. A

public meeting may be held, during the DEIS comment period, to obtain comments and answer questions.

At each stage of the EIS process, HRB personnel as part of an Interdisciplinary Team (IDT) review information and documentation, and provide input on the proposed project. IDT membership includes personnel from the agencies involved with the project. For example, members of the IDT for one file reviewed during our audit included DSL, DHES, and USFS personnel. The team meets to determine the progress of the EIS process and what other items must be completed. Prior to release of the DEIS, team members review the document, then conduct internal meetings to discuss the proposed project and finalize the document. The draft document is then released for public comment, which includes comments from other agencies. Comments to the DEIS are reviewed by team members, and internal meetings are held to discuss new issues, to propose changes to the DEIS, and to identify responses to substantive comments. The agencies also summarize conclusions and changes from the DEIS in the final environmental impact statement (FEIS). The FEIS document is then issued. If any substantial changes are made to the applicant's proposed action or significant new circumstances are discovered, a supplement to the FEIS may be prepared.

MEPA Coordinators

HRB's EISs are usually prepared by third-party contractors under direction of HRB's MEPA coordinators. They help develop requests for proposals, review submitted proposals, select a contractor, as well as supervise the selected contractor. They are also responsible for coordinating and communicating with HRB personnel and other agencies regarding EIS development. Per MEPA statutes, the operating permit applicant is responsible for paying EIS costs. MEPA statutes specify maximum fees which may be charged to each project for developing an EIS. Fees are based on the estimated cost of the proposed project and are deposited in a state special revenue account. MEPA coordinators track EIS development costs and bill the applicant monthly. The bureau chief authorizes issuance of warrants from the special revenue account to the EIS contractors.

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Once the final EIS is published, a MEPA coordinator's responsibilities typically end for that proposed project.

Record of Decision

After issuing the FEIS, HRB prepares a record of decision (ROD). The ROD states what DSL's decision is on the proposed action, its reasons for the decision, and any special conditions of the decision. By statute the HRB must wait at least 15 days after issuance of the FEIS to publish the ROD. A permit is not issued by HRB until the ROD is complete and the applicant submits the required bond.

For projects on federal land, the participating federal agency also issues a ROD. Depending upon the agreement between the state and federal agencies and the specific proposal, either a separate ROD is issued by each agency or a joint decision is issued.

Performance Bond

If the decision is to approve the permit application, HRB calculates the amount of performance bond required. The applicant must submit a bond to HRB to guarantee performance of the requirements of the MMRA, rules, and operating permit. The performance bond amount is determined by HRB and statutorily set at an amount not less than the estimated cost to the state to ensure compliance with the MMRA, administrative rules, and the permit. Bond amounts for the 87 active mine operating permits range from \$1,000 to more than \$36,000,000. Ten of the 87 total bonds are greater than \$1 million. Bond amounts must be reviewed by HRB at least every five years to determine if amounts, at a minimum, will cover current reclamation costs.

Approval or Denial of Permit Application

Permit conditions known as stipulations may be attached to the operating permit in order to mitigate impacts of the proposed project. These requirements vary from site to site and may include additional reporting, testing, and/or operational limitations. If the decision is to approve the permit application, mine operations can begin once a performance bond is received and

accepted by the HRB and the permit is issued. The final step in the permitting process is approval or denial of the operating permit. If the permit is denied, the applicant can appeal the decision to District Court and/or reapply.

Operating Permit Amendments

Permittees may also file amendments to existing operating permits. An amendment is a change to an approved operating or reclamation plan. The process for amending an operating permit is the same as the process described for new applications. The degree of HRB review of the amendment depends on the perceived impacts on the existing operating and reclamation plans as well as potential environmental impact. HRB has issued 145 amendments to operating permits since 1974, with approximately 48 amendments issued since January 1, 1989.

Permit Monitoring

HRB is responsible for monitoring mining operations in Montana. Monitoring includes self-monitoring by permittees, inspection of mine sites, sampling and verification of permittee data, review of annual reports and other operator-generated information, and communication with mine personnel. When a permit is approved, the permittee must conduct mining activities according to the approved plans. By statute, permittees are required to submit annual reports of mine activities to HRB within 30 days of the anniversary of the permit approval date. In addition, conditions of the permit may require additional reporting, for instance, monthly and/or quarterly reporting of water quality testing.

Personnel review mine activity reports to help determine compliance with the MMRA, rules, and the operating permit. On-site monitoring activity varies from permit to permit. Inspections typically occur from 1 to 4 times per year depending on the size, complexity and location of the mine, and other HRB priorities. Personnel focus mainly on typical problem areas such as water-related impacts, engineering, waste-rock characteristics, and reclamation efforts.

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Reclamation

Many mine projects complete reclamation concurrently with operations. As reclamation is completed, HRB personnel inspect areas and decrease bond amounts proportionately to the total acreage of the mine site. A permittee has two years to comply with reclamation plans after completion or abandonment of mining operations. If HRB approves the reclamation, the corresponding bond amount is released. If a mining project is on federal land, federal agencies usually are involved in reclamation review and approval. Based upon the files reviewed, we did not note any problems with HRB's bond release process.

Permit Enforcement

Permittees are required by statute to comply with the MMRA, DSL rules, and approved operation and reclamation plans specified in the permit. In the event a potential violation is noted, HRB personnel generally discuss the situation with the permittee. If a violation exists, the permittee is sent a Notice of Noncompliance (NON) describing any deficiencies noted. The NON describes the action(s) and time frame required to correct noted deficiencies. Approximately 42 enforcement actions were taken by HRB between January 1989 and September 1994.

Depending on the violation and subsequent permittee response, HRB may proceed with a penalty assessment which is administratively determined. Penalties are variable and based upon multiple factors including degree of seriousness, conduct of the permittee regarding the violation, past violations, and good faith efforts to correct or alleviate identified deficiencies. Penalty amounts, as defined by MMRA statutes, are \$100 to \$1,000 for the violation, with an additional penalty of \$100 to \$1,000 per day for as long as the violation continues. For the 42 enforcement actions taken by HRB against operating permit holders, 30 penalties were assessed and 15 penalties were paid, to date, ranging from \$500 to \$7,200. The permittee is notified, in writing, of the HRB penalty assessment. If a permittee does not bring operations back into compliance and/or does not pay penalties, HRB must go through court proceedings to recover penalties and stop illegal activities.

Chapter III

Hard Rock Bureau Administration

Introduction

As part of our performance audit of the Hard Rock Bureau (HRB), we reviewed several areas relating to bureau administration. The primary focus of this review involved evaluation of:

- whether the number of HRB personnel and/or workload negatively impacts the bureau's ability to perform its regulatory responsibilities; and
- communication and coordination with the Water Quality Division (WQD), Department of Health & Environmental Sciences (DHES).

However, as result of our work in the above areas, we also focused on management oversight of bureau activities. Specifically, while examining the bureau's permitting, monitoring, and compliance enforcement processes, we reviewed such management controls as policies and procedures, staff supervision, and overall management direction and review of staff work products.

The following sections discuss our findings, including recommendations for improvement.

Management Oversight of Staff's Daily and Procedural Activities Could be Improved

As noted in the background chapter (Chapter II), HRB's activities can be categorized into three fundamental activities: permitting, monitoring, and compliance enforcement. Each activity consists of a process or processes which HRB personnel utilize to undertake that activity. All HRB technical staff are involved in each of the bureau's activities. Management's role in these activities is basic. It is management's role to direct and coordinate the use of resources toward some pre-determined end by planning, staffing, and directing the utilization of those resources.

On a daily basis, HRB technical staff are required to use their "best professional judgment" in regard to permitting, monitoring, and compliance enforcement decisions. Due to the technical nature of what the staff do, HRB management has given them a significant amount of personal flexibility in terms of priority management and in addressing problems/issues relative to their assigned responsibilities. As a result, HRB management has not

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Hard Rock Bureau Administration

focused its attention on the development of detailed, formal policies and procedures for all staff activities, or established comprehensive supervisory oversight to assure staff follow processes which meet management expectations. Rather, HRB management primarily relies on the staff's professionalism to address bureau needs.

While we acknowledge the need for HRB management to allow technical staff to use their discretion and experience in addressing and solving problems within their area of expertise, we believe additional management involvement is necessary. Throughout our review, we identified deficiencies in management controls. The following are examples of areas, relative to bureau activities, which could be improved:

Permitting - actual and potential noncompliance with statutes due to lack of detailed procedures; lack of staff awareness of statutory requirements; and insufficient management review of compliance assurance and the overall permit decision process.

Monitoring - mine inspections not conducted as required by statute; inconsistent and/or incomplete inspection methodology and documentation; and inadequate processes for tracking and monitoring of both HRB inspections and self-monitoring reports submitted by the permittee.

Compliance Enforcement - timing of the issuance of NONs and penalty assessments; lack of documented follow-up on permittee abatements; and insufficient documentation regarding penalty calculations and determinations.

The outcome of these deficiencies is that HRB's processes are not as effective as they could be for accomplishing their various activities and assuring compliance with applicable statutory responsibilities. The recommendations in the following chapters are specific in regard to processes used by staff to conduct bureau activity. However, without increased management oversight over how those processes are conducted, there is no assurance proposed improvements will be initiated or have the desired effect.

**Bureau Management
Information Needs to be
Expanded**

From the outset of the audit, we obtained interview information from HRB personnel, industry, and environmental representatives regarding concerns about staff turnover and number of personnel available to adequately address the bureau's responsibilities. When we attempted to evaluate the validity of these concerns, we found HRB does not routinely compile or analyze task-specific information regarding bureau activities. Workload data such as active applications, amendments, pending inspections, and status of ongoing enforcement activities is not in a format which allows easy or comprehensive analysis. Therefore, there is no detailed management information compiled or formal bureau analysis of the impacts of such personnel activities as completeness reviews, EA development, IDT involvement, or mine monitoring. As a result, we were unable to fully assess whether the number of personnel and/or workload negatively impacts the bureau's ability to perform its regulatory responsibilities.

Management information is essential for assisting in effective management control. It provides a means for measuring personnel and program performance, as well as progress toward program goals. A comprehensive management information system would identify and document day-to-day operations and help plan and manage bureau activities.

The effect of HRB not having a management system which compiles critical information about bureau operations and allows analysis of such data is illustrated in the following examples.

- Currently, many HRB decisions involving staff work assignments are reactive. They are based on such factors as the number of pending applications and amendments which must be reviewed relative to statutory time frames. Other bureau activities such as monitoring and compliance enforcement do not have as high a priority as permitting decisions. HRB must also factor in such unforeseen issues as land slides, water quality issues resulting from acid rock drainage, litigation, and mine closures. However, HRB personnel cannot demonstrate or measure how much impact permitting activities have on other activities or how much other activities affect permitting.

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Hard Rock Bureau Administration

- Existing data analysis is generally done after completion of the calendar year. For example, HRB personnel determined in January 1994 that not all 1993 mine inspections were done. Without some form of ongoing analysis of bureau activities, permittee noncompliance may not be identified. Also potential deficiencies in personnel work methods and products may not be identified.
- According to HRB personnel, the increased complexity of the industry, expanded environmental awareness of mining activities, and more involvement by federal agencies has increased the bureau's workload. Personnel believe this complexity and subsequent scrutiny has created a need for additional and increasingly specialized personnel. Issues such as impacts to wildlife and increased emphasis on assurance of water quality are used as justifications for more FTE. While these types of specialized personnel may be warranted, there is no detailed information compiled to support this belief.

Specifically, there is no HRB management information generated to demonstrate how much time personnel spend on wildlife issues or what the impacts are of having to rely on other state agency expertise in regard to the permitting process. Also, there is no data on how much time hydrologists spend reviewing and/or conducting trend analyses of water quality monitoring reports or how elimination of this responsibility would impact their other responsibilities if more hydrology-related personnel were added.

- Section 82-4-335(3), MCA, gives the department authority to charge additional fees to cover expenses for permit application reviews which exceed normal operating expenses. However, HRB does not compile expense data and has not defined "normal operating expenses." In addition, HRB has not developed rules establishing criteria for assessment of additional fees. As a result, HRB cannot easily justify charging additional fees for expenses beyond normal operating costs.

Based on observations and interviews, HRB focuses its attention on meeting statutory time frames for making permitting decisions regarding proposed mining activities. The bureau does not have any personnel compiling overall management information. As a result, personnel and workload analysis is not a bureau management priority and compilation of such data is not viewed as having the same priority as other aspects of bureau

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administration. In response to our findings, HRB management believes it is not feasible to develop a workload analysis for task specific activities. They stated projects vary and there is a limited amount of time to establish and maintain such information. Management personnel also indicated available resources (staff and budget) have determined the level of bureau efficiency and number of staff needed to do the job has been identified on the basis of work not getting done.

We concur bureau activities and administration have been impacted by increased and changing mining activity and expanded public involvement over the past five years. However, this scenario is even more reason for developing a comprehensive management system. Management review of staffing needs, based on what is not accomplished, is not only a reactive approach, but difficult to measure and justify. It also leads to the types of problems noted in the examples and makes either management or external analysis of potential for increased productivity nearly impossible. By compiling and analyzing specific workload data such as determining the percentage or amount of time staff spend to complete bureau functions and tasks, (i.e., pre-application and completeness reviews, meetings, inspections, etc.) and examining corresponding personnel needs, we believe HRB can develop a proactive management tool which will assist in bureau administration.

Recommendation #1

We recommend HRB compile and analyze more specific workload data on bureau activities to help manage bureau functions and identify personnel needs.

Chapter III

Hard Rock Bureau Administration

HRB Communication/Coordination With the Water Quality Division Needs Review

Throughout the course of the HRB audit we received extensive comments about communication and coordination problems between the HRB and the DHES Water Quality Division (WQD) regarding permitting and monitoring of mines. During our audit, we examined the process/procedures used by the two agencies to coordinate mine regulation. Our review indicates only minimal coordination between the two agencies, and communication between the two entities is limited. Communication primarily consists of the HRB-WQD liaison attending the weekly HRB staff meeting and accompanying personnel on an occasional HRB inspection. Based on the existing Memorandum of Understanding (MOU) and liaison agreement, a more effective process should exist.

DSL and DHES established an MOU and liaison agreement to delineate and clarify responsibilities of both agencies in the implementation of state laws regulating mining activity as it pertains to water quality. The agreements were also implemented to ensure an efficient and integrated approach to dealing with the water quality aspects of hard-rock mining. These documents could be improved. This could be done by outlining specific responsibilities, establishing detailed time frames for regulatory decision-making, and including corrective measures.

We believe the interagency agreements are not working effectively, and provide the following examples of problems:

- According to HRB personnel, WQD did not respond to completeness review requests for 9 of 13 selected projects over the past two years. This lack of response appears to be in direct noncompliance with the MOU language.
- Our review of monitoring documentation and interviews indicated WQD does not always follow-up or conduct timely follow-up on potential water quality violations referred to WQD by HRB personnel. We also noted WQD personnel rarely accompany HRB personnel on mine inspections and WQD conducts only minimal independent mine inspections.

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- WQD and HRB do not appear to share inspection report findings on a timely basis. We noted only limited documentation of WQD inspections in HRB files. We also noted the HRB inspection reports have only recently been routinely sent to WQD. Also, based on audit work at both agencies, there is no assurance these shared inspection reports are reviewed and/or followed up on.
- The current liaison contract calls for HRB to fund 47 percent of the liaison FTE and WQD to fund the remaining percentage. However, the contract does not sufficiently specify who will supervise the position or what the position's responsibilities are relative to each agency. As a result, there is ongoing misunderstanding about HRB's authority to direct the liaison's activities. It is our belief HRB has little or no control over the liaison's work assignments and/or priorities.

Lack of specifics regarding supervisory control has also impacted the liaison's perceptions of who he works for. Presently, the assigned liaison believes he is a DHES employee, and as a result, spends only minimal time at HRB even though HRB pays nearly half the position's salary.

- The current MOU does not comprehensively address the liaison position or what actions can be taken if either agency believes the agreement needs change or is not working.

We believe the reasons for the above problems are two-fold: one, there is a lack of management emphasis on correcting the identified problems. While HRB and WQD personnel indicate there have been discussions regarding the role of the liaison and the interagency relationship, there is little or no evidence which indicates formal actions have ever been taken to improve the deficiencies. Demonstrated lack of management emphasis is also illustrated by an MOU which has not been formally reviewed since its establishment in mid-1992, even though MOU language indicates a review should have been done prior to January 1, 1994. Additionally, the liaison agreement between the agencies expired June 30, 1994 and there has been no formal effort made to renew/revise the existing liaison arrangement.

The second reason for deficiencies in communication and coordination between the agencies is language in the MOU and the liaison contract is too general. The MOU has only a limited

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discussion of the liaison position, and it lacks specifics regarding when input is needed or what follow-up actions are required. For example, the MOU states each agency will notify the other of a violation in five working days. However, it does not specify how this notification should occur or prescribe what follow-up actions are to be implemented to assure violation investigation/resolution. If the agreements are re-established, the language needs to be more specific.

The purpose of the MOU to establish and maintain close coordination to ensure proper implementation and enforcement of the MMRA, WQA, and MEPA is not being attained. DSL and DHES need to re-evaluate the liaison position and MOU to determine whether these agreements are the most effective method of achieving the interagency communication and coordination referred to in the MMRA and MEPA statutes.

Recommendation #2

We recommend DSL re-evaluate the communication and coordination process with DHES in regard to implementing and enforcing the MMRA, WQA, and MEPA.

Overall Summary

One of our audit objectives was to examine workload and staffing levels to determine whether staff could effectively and efficiently perform the bureau's statutorily-mandated regulatory responsibilities. To help make this determination we observed staff activities both at the bureau and out in the field. We also reviewed the bureau's existing management information and permit files to gain a sense of daily staff activities.

The observations and reviews indicated HRB staff have a significant number of complex and varied tasks which they are involved in. Permitting, monitoring, and compliance enforcement make up the framework of bureau activities, but

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does not illustrate the types and degree of staff involvement within each of those functions. Staff are required to analyze and comment on proposed and actual mining operations, conduct inspections, attend innumerable meetings and public hearings, and perform all these activities simultaneously for multiple projects in varying stages of completion and which have differing time deadlines. Faced with these multiple priorities the bureau's management emphasis has focused on meeting statutory time frames and requirements rather than overall bureau administration. Further, HRB management has placed reliance on the technical staff to assure statutory requirements are complied with and a consistent process of decision-making instituted. The reliance on staff has taken the place of such management controls as comprehensive policies and procedures, management information about task specific activities, and routine managerial oversight of the staff's activities and work products.

Conclusion

We recognize and acknowledge HRB's recent efforts to address an increasingly complex and changing regulatory role. We believe a greater management effort should be made to define, monitor, and evaluate bureau activities. Increased management oversight and detailed management information will provide personnel and activity data in order to measure outcomes and productivity more effectively.

Bureau administration could be improved by expanding the existing management controls and initiating others. DSL, by virtue of the MMRA and MEPA requirements for ensuring communication and coordination with other agencies, should make every effort to establish a functional relationship with DHES in regard to the permitting and monitoring of mining activities.

Chapter IV

Permitting of Hard Rock Mines

Introduction

During the performance audit of the Hard Rock Bureau (HRB), we evaluated the process used to permit hard-rock mines. The various components of the permitting process include:

- permit application completeness review,
- permit application adequacy review, and
- permit approval/denial procedures.

Within each component there are specific bureau responsibilities and activities performed to address the statutory requirements of the MMRA and MEPA. Our evaluation reviewed the bureau's permitting responsibilities and activities to examine:

- compliance with applicable statutes including the mandated permitting time frames,
- bureau procedures for conducting each permitting component,
- documentation of bureau permitting decisions, and
- overall bureau management of the permitting process.

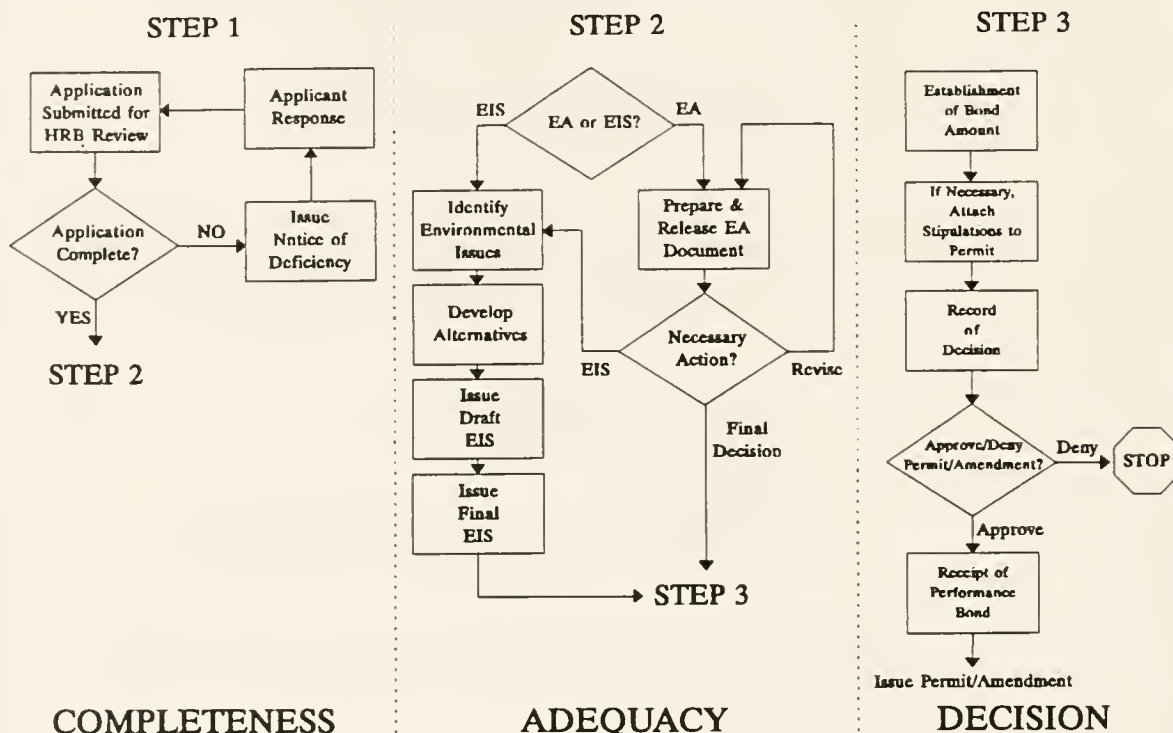
Figure 5 identifies the process outlined in the MMRA and utilized by the HRB to make permit decisions for proposed hard-rock mines.

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Figure 5

HRB Permit Decision Process



Source: Compiled by the Office of the Legislative Auditor.

During our initial work, we reviewed HRB permitting files for 16 judgmentally selected mines, including a mix of operating permit applications and applications for amendments to existing operating permits. To supplement our file review, we interviewed department personnel about the permitting process in general and the selected mines in particular. We also obtained input about the permitting process from other state and federal agencies, environmental groups, and various mining companies. The following table shows permitting process time frames for the 16 files we reviewed.

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Table 3

Permitting Process Time Frames
(new permits and amendments evaluated during our review)

Mine	Applic Recv'd	# Defic Letters	Complete Date	DEA/DEIS Issued	FEA/FEIS Issued	ROD Issued	Bond Recv'd	Date of Permit
A	12-29-88	2	6-26-89	7-26-89	8-21-89	N/A	8-24-89	8-24-89
B	2-7-89	1	4-24-89	5-89	5-89	N/A	6-4-90	6-15-90
C	10-4-89	2	7-12-90	8-17-90	9-14-90	N/A	9-26-90 ¹	10-4-90
D	1-15-88	1	3-31-88	5-12-88	5-12-88	N/A	8-1-91 ¹	10-15-91
E	8-30-90	2 ²	1-2-91	2-5-91	2-20-91	N/A	7-2-92	7-9-92
F	1-29-92 ²	1 ²	4-16-92	5-6-92	5-20-92	N/A	12-1-92	12-11-92
	4-21-93 ³	1 ³	UTD	5-21-93	6-16-93	N/A	6-16-93	7-27-93
G	2-28-90	3	8-22-90	5-91	5-92	12-14-92	4-19-93	4-26-93
H	11-17-89	4	2-26-92	3-9-92	3-19-92	N/A	4-23-92	4-24-92
I	8-20-90	1	3-20-91	4-15-91	4-30-91	N/A	5-15-91	5-16-91
J	8-18-92 ⁴	3 ⁴	3-3-93	3-16-93	6-30-93	7-20-93	7-16-93 ⁵	7-20-93
K	4-10-92	1	6-25-92	8-19-92	9-25-92	N/A	N/A ⁵	10-5-92
L	3-11-88	4	1-13-89	3-89	5-90	N/A	7-9-90	7-9-90
M	2-22-89	1	4-24-89	5-24-89	6-89	N/A	6-30-89	6-30-89
	9-6-89 ⁶	0 ⁶	N/A	N/A	N/A	N/A	9-11-89	9-19-89
	8-3-89	3	1-26-90	3-26-90	3-30-90	N/A	4-6-90	4-16-90
	11-20-89	2	3-23-90	4-20-90	4-90	N/A	7-23-90	4-24-90
	2-2-90	2	6-7-90	7-10-90	7-20-90	N/A	7-23-90	7-24-90
N	5-4-90	2	8-16-90	8-15-90	8-25-90	N/A	7-30-90	8-27-90 ⁷
	3-16-92	1	6-2-92	7-8-92	8-6-92 ⁸	N/A	N/A ⁸	N/A ⁷
O	7-5-89	0	7-20-89	N/A	N/A ⁸	N/A	N/A ⁸	7-24-89
P	2-2-90	1	4-17-90	4-20-90	UTD	N/A	10-16-90	10-25-90
	4-19-93	1	6-9-93	6-10-93	6-10-93	N/A	7-30-93	12-14-93

N/A = not applicable; UTD = unable to determine

- ¹ submitted application changes on 7-12-91
- ² resubmitted application - original submission on 1-21-91 w/ 1 deficiency letter
- ³ original submission on 12-10-92; modification on 1-6-93 w/ 1 deficiency letter
- ⁴ resubmitted application - original submission on 1-17-92 w/ 2 deficiency letters
- ⁵ adequate bond already covered proposed actions
- ⁶ application changed - original submission on 8-3-89 w/ 1 deficiency letter
- ⁷ company chose to not submit bond - no permit issued
- ⁸ checklist EA completed on 7-21-89; no additional bond necessary

Source: Compiled by the Office of the Legislative Auditor from bureau records.

The following sections discuss our concerns with the bureau's permitting process and specific issues within the process.

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HRB's Adequacy Review Period has Extended Beyond the Statutory Time Frame for Some Projects

Section 82-4-337, MCA, requires the HRB to follow specific time frames in issuing an operating permit. There are separate time frames for determining application completeness and reviewing operating and reclamation plan adequacy.

Completeness Reviews

The initial application completeness review must be done within 60 days of application receipt. Subsequent completeness reviews must be done within 30 days of receipt of the deficiency response. The overall amount of time for the completeness review component depends upon the applicant's response time to the deficiency review and the bureau's determination of whether submitted responses address the identified deficiencies. Should the HRB not comply with the statutory time frames, the application is considered complete.

For the permit applications in our review, HRB met mandated completeness review time frames.

Adequacy Reviews

Upon determination of application completeness by HRB, the bureau has another 30 days to review adequacy of the proposed reclamation plan and plan of operations. It is during this time period when the bureau formally determines what degree of environmental review (Environmental Analysis (EA) or Environmental Impact Statement (EIS)) is necessary to address the actual and potential environmental impacts of the proposed mine. If HRB determines additional time is needed to conduct application adequacy, the bureau and applicant can negotiate to extend the period by not more than 365 days. Failure by HRB to act upon a complete application within the designated time frames constitutes application approval and a permit must be issued upon receipt of the performance bond. For the files we reviewed all permits were issued after HRB acted on the complete application.

**Legislative Changes may
be Needed**

We did identify instances where HRB exceeded mandated adequacy review time frames due to the amount of time needed to complete the review. Of the 16 mines reviewed, we noted two instances of the adequacy review period exceeding the statutory time frame. We also noted one mine which was not issued a permit for 21 months after the HRB determination of application completeness. Of the three applications currently in the HRB adequacy process, two have exceeded the statutory time frame and the third may also exceed the time frame. The adequacy process for one of the current applications had already taken 18 months as of October 1994, (six months beyond the additional 365-day time frame) and is not expected to be completed for several more years. Even though HRB may have received applicant approval to extend the time needed for adequacy determination, the HRB does not have the authority to extend this period beyond the additional 365 days prescribed by statute.

The process of conducting an adequacy determination can be complex. It is dependent upon the nature of the proposed project, location, amount of public interest, and degree of involvement by other state and federal agencies. Based upon our review, these factors have and will continue to make it difficult for the HRB to comply with the existing adequacy review time frame for certain mine proposals. For example, none of the potentially involved federal or other state agencies (Forest Service, BLM, EPA, or Montana's DHES) have mandated time frames for their role in the making of HRB permitting decisions. But, these same agencies do have their own permits and permit decision-making processes which may or may not be conducted jointly or parallel with the HRB's permit process; however, MEPA drives joint review.

In cases where HRB could not determine adequacy within the additional 365-day time frame, the department and applicant negotiated beyond statutory authority rather than deny the permit and end the entire process. As a result, the bureau has not complied with current statute. However, current statutes do not provide the flexibility to extend the time period. Yet, as outside interest in proposed applications increases, so does the

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potential for time frames to be exceeded. Therefore, there are two options available to HRB. One is to comply with current statutes by approving or denying permits within the additional 365-day time frame. The other option is to recognize the necessity of the current process, the complexity of review, and increased interest in current mining activity and seek legislative authority to allow negotiation of a specific extension of the 365-day time frame.

Recommendation #3

We recommend HRB:

- A. Comply with the additional 365-day time frame for all adequacy reviews; or**
- B. Seek legislation for statutory authority to negotiate a specific extension of time frames in instances where adequacy cannot be determined in the additional 365 days.**

There is a Need for Increased Management Oversight of the Permitting Process

To evaluate HRB's permitting process and management oversight, we compiled "profiles" for each mine reviewed. The profiles consisted of an examination of all applicable documentation regarding the permitting of each mine, including:

- identification of time frames from permit application through permit issuance,
- testing of compliance with applicable statutes and rules,
- review of the bureau's completeness and adequacy processes,
- performance bond calculation methodologies, and
- available documentation which describes and/or supports the bureau's permitting decision-making.

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Throughout our review of the permitting process and the associated bureau files, we identified:

- actual and potential noncompliances with statutes,
- lack of formal assurance all permitting components were completed and/or considered prior to permitting, and
- lack of documented support for various types of HRB permitting decisions.

The next two sections discuss these issues further and indicate a need for increased management oversight.

HRB Needs to Improve Procedures for Assuring Statutory Compliance with Permitting-Related Statutes

We identified a number of concerns related to HRB's permitting process in regard to compliance with the MMRA. For example, several sections of the MMRA require the applicant to supply information in the operating permit application. For the files we reviewed, some of the required information was missing.

Examples of information not found included a listing of the names and addresses of all company officers and owners with more than a 10 percent interest in the company. Also, applications are to include an affidavit certifying the applicant is not currently in violation in this state of any law, rule, or regulation pertaining to air quality, water quality, or land reclamation. For the mines we reviewed for which this statute was applicable, 80 percent (4 of 5) of the files did not contain this affidavit.

Our audit also determined HRB does not always develop or maintain documentation of compliance with MMRA provisions. Several files lacked detail necessary to demonstrate MMRA compliance. For example, we noted permit files did not consistently document the required distribution of legal notices of receipt of operating permit applications. We also determined in one instance an amended operating permit was issued by HRB prior to the required receipt of the performance bond. We also found the bureau did not notify district weed boards of the issuance of operating permits for mines as required by section 7-22-2152, MCA.

When we asked HRB staff and management about the reasons for the various noncompliances, the responses included: 1) lack

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of awareness of some MMRA requirements; 2) staff oversight of the need for documentation; and 3) documentation demonstrating compliance has either been lost or is missing. All of these reasons suggest the need for increased management oversight. To address each of these causes the bureau should:

- provide training to inform personnel,
- emphasize the need for documentation, and
- periodically review compliance with applicable statutes.

Through staff training, more detailed procedures, and documentation demonstrating compliance, HRB management can reduce noncompliance with mine permitting statutes.

Recommendation #4

We recommend HRB management expand management oversight to assure compliance with mine permitting statutes.

Formal Requirements Should be Established for the Documentation and Support of HRB's Permitting Decisions

During our review, we found there is no formal method employed by the bureau to ensure all phases of the process are properly completed, and that permits issued address all identified impacts.

There are several decision-making points within the permitting components including:

- determinations of the type and amount of information needed for application completeness,
- determinations of the type of environmental review (EA or EIS) which will fully address application adequacy,
- subsequent identification of environmental alternatives resulting from the environmental review, and

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- determination of whether a permit should be issued, and if so, what conditions or stipulations should be attached to the permit.

These decision-making points and subsequent HRB decisions are critical to the final outcomes of the permitting process. Not documenting and supporting how those decisions are made reduces the public's ability to gain a clear understanding of the permitting process, and appears to contradict the implied intent of the MMRA and MEPA. This intent is to assure there has been sufficient environmental consideration of the proposal and appropriate safeguards implemented. The following are examples of where HRB did not sufficiently support and/or document its decision-making.

- Neither the HRB files nor the deficiency letters sent to the applicant fully demonstrate or document: a) whether personnel have considered all aspects of a mine's proposed operation or reclamation plans; or b) what criteria personnel used to evaluate the proposals and/or identify areas of deficiency in those plans.
- Deficiency letters do not consistently contain all HRB concerns and/or recommendations identified in the completeness review process. Additionally, documentation of reasons for changing or omitting identified concerns from deficiency letters does not always exist in the files.
- In many cases, documentation of communication and coordination with other state and federal agencies during completeness reviews is inconsistent and/or unclear.
- Currently, HRB's permitting files do not include documentation of why an EA was completed as opposed to an EIS. In addition, when checklist EAs are used, there is virtually no documentation supporting or indicating how determinations of impact were made.
- HRB does not consistently respond to technical concerns made by the public in EISs which fully demonstrates a scientific or technical evaluation.
- Documentation of reasons for including stipulations in permits and/or why particular stipulations mitigate impacts

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below "the level of significance" is not consistently developed.

In addition, we noted in one of the 16 mines reviewed HRB did not ensure all aspects of the application completeness component were finalized prior to issuing an operating permit. In other instances, we noted staff recommendations for changes in proposed plans based on their completeness reviews were either not required to be included in the applicant's proposed plans or not added later as stipulations of the permit. These concerns appeared to be a result of lack of documentation, rather than a lack of action on the bureau's part.

HRB permitting decisions are often controversial because of the potential and/or actual impacts of a mine on the environment and/or public. Information and mitigating factors derived from a completeness review or adequacy review (EA or EIS) are not legally enforceable by HRB if they do not become part of the permit.

During our audit period, HRB did not have a system in place to comprehensively evaluate completeness and adequacy review outcomes to ensure those outcomes were appropriately addressed prior to permit issuance. For the examples noted in our review, it appears some completeness and adequacy findings were either overlooked or the decision-making process was not satisfactorily documented to support the decision.

Due to the potential for controversy about HRB permitting decisions, each component of the process should be documented to ensure all actions taken by the HRB are clear to interested parties. For example, the environmental reviews (EA or EIS) are public decision-making documents which should include enough detail to give the reader an understanding of how, or on what basis, environmental impact decisions were made. Failure to provide reasons for completing EAs versus EISs, lack of specific responses to public comments, why stipulations were or were not attached and how they reduce impacts, has created confusion about HRB actions. Confusion may lead to disagreements between HRB, mining companies, and/or the public, which may

result in permitting delays and/or legal action being brought against the department. If responses to public comments are not consistently supported with readily-verifiable criteria, the public has no assurance there is/was an appropriate independent scientific/technical basis for the environmental review of mine impacts.

Type, amount, and quality of documented support for HRB's decision-making in regard to the permitting process is dependent upon existing management expectations of what is necessary and subsequent oversight of the process to assure those expectations are met. Based upon our findings, we do not believe the bureau's existing procedures for documenting the basis for its decisions or the current managerial oversight of the process ensure detailed information is provided.

**HRB Management has
Formulated Changes in the
Permitting Process.
Additional Management
Oversight is Necessary to
Ensure Comprehensive
Decision-Making**

In response to all our initial findings regarding permitting, HRB management developed a detailed checklist which outlines statutory responsibilities, prescribed topics for consideration when conducting completeness reviews, adequacy, and permit issuance. After each of the review requirements outlined, there is a requirement for the assigned reviewer to initial the task or requirement as completed. We believe use of the checklist will help ensure the various permit application components have been consistently reviewed. However, it will also be necessary for HRB management to initiate regularly scheduled reviews of checklist accuracy and use to ensure a comprehensive permitting process is in place.

Article IX, sections 1 and 2, of the Montana Constitution, sections 75-1-103 and 201 as well as 82-4-301 and 302, MCA, generally outline agencies' responsibilities regarding environmental protection and reclamation. For HRB to fully demonstrate its compliance with the intent of these constitutional and statutory mandates, we believe it is necessary to have permitting procedures and documentation standards which demonstrate and assure compliance. This is important because each and every decision made by HRB during the permitting process has an effect on the outcome, and the outcome of the

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permit decision affects the public. Consequently, HRB should have a permitting process in place which clearly defines not only its procedures, but also how decisions are made and supported. To have assurance of consistency in meeting the noted criteria, HRB must have management oversight which emphasizes a consistent documented procedure and which evaluates not only the outcomes, but the actual permitting process itself.

Recommendation #5

We recommend HRB management initiate a more comprehensive and consistent process for making, supporting, and documenting permitting decisions.

Overall Summary on the Timeliness of the HRB Permitting Process

Our objective for reviewing the HRB permitting process was to determine bureau compliance with applicable statutes in the MMRA and MEPA. These statutes include mandated time frames for completeness and adequacy reviews which must be conducted prior to making a permitting decision. Our evaluation of the permitting process indicated it is a technical, complex process in which HRB relies greatly on the professional judgment of its staff. Additionally, the timing and outcomes of the process are, in large part, dependent upon actions of other state and federal agencies which do not have time frames for making permitting decisions. Overall, our permitting review noted:

- Mandated time frames for application completeness review were met by the bureau.
- Mandated time frames for determining application adequacy, in some cases, were exceeded by the HRB. These time frames, which were established as part of the MMRA's creation in 1971, are not always feasible given the complexity of today's environmental review. The total of 395 days given for review (30 + 365) cannot likely be met for proposed mines in which the location, size, or type of

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mineral extraction pose extensive potential environmental impacts. However, current statutes do not provide for extension beyond 395 days.

- While HRB management and personnel have demonstrated a significant amount of time and energy is expended on completing the permitting process within statutory time frames, the process lacks procedures, documentation standards, and management oversight to ensure it is consistent, comprehensive, and readily understandable to permit applicants and the general public.

Conclusion

The initiation and development of expanded management controls over the permitting process will help ensure compliance with applicable statutes and improve the bureau's permitting decisions.

Chapter V

Monitoring of Mines

Introduction

We reviewed Hard Rock Bureau (HRB) procedures for monitoring permitted mine operations. We evaluated various aspects of the monitoring process including:

- permit stipulation compliance testing,
- site inspection procedures,
- documentation related to on-site visits,
- analysis of operator-generated reports, and
- overall compliance with the Metal Mine Reclamation Act.

The primary focus of our monitoring review involved the analysis of HRB files for 23 judgmentally selected mines. We observed mine inspections by HRB personnel and conducted interviews to gain an understanding of the monitoring process. We also obtained input from applicable federal agencies, environmental groups, and numerous mining companies.

HRB is responsible for monitoring requirements of each operating permit until mining activity ceases and reclamation is complete. Permit requirements are contained in operating and reclamation plans, and permit stipulations. HRB conducts on-site inspections of permitted mining operations. In addition, self-monitoring information on mining activities is submitted to HRB by permittees. As discussed in the following sections, we noted improvements could be made in several areas regarding HRB's monitoring process.

Lack of Permit Stipulation Detail Creates Difficulties in Monitoring

Operating permit conditions are developed to mitigate effects or monitor activities to help resolve potential compliance issues. While operating permit stipulations are developed prior to the monitoring process, permittee compliance with stipulations often becomes the primary basis for future monitoring efforts. Although the language used for some permit stipulations is detailed in terms of specific parameters and completion dates, we noted a significant amount of generality in many stipulations. Specifically, we observed stipulations which did not include time frames, methodologies, or detailed courses of action. For example, a stipulation in one operating permit states "the permit boundary must be permanently marked in such a manner that it

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can be easily located." There are no reporting requirements or time frames for marking the boundary specified in the permit. Lack of detail in permit stipulations may make enforcement during monitoring difficult. Based upon our file reviews and observations, as well as interviews with HRB personnel and industry representatives, lack of clearly specified permit stipulations has caused miscommunication, violations of intended operating or reclamation requirements, and difficulty in attaining compliance and enforcement.

According to HRB policy regarding permit decision making, stipulations must clearly identify: 1) the activity, report, or plan required; 2) whether or not department approval is needed before implementing a plan or continuing a course of action; and 3) the time frames within which the activity, report, or plan must be completed. If practicable, due dates should either be prompt (30 or 60 days), or should coincide with the anniversary date of the operating permit.

HRB Agrees the Process can be Improved

The department agrees the current process for reviewing permit stipulations can be improved and stated an informal checklist of content criteria will be used in the future. We believe this type of stipulation review should not only be used, but formalized to assure consistency of usage. A formal review process should ensure stipulation language is clear and consistent, and current policy requirements are met. Also, a formalized approach will help increase the enforceability of permit stipulations.

Recommendation #6

We recommend HRB:

- A. Ensure clarity, consistency, and enforceability of all operating permit stipulations.**
- B. Develop and implement a formal process for reviewing permit stipulation language prior to permit issuance.**

**HRB Inspection
Procedures**

Monitoring includes inspection of mining operations to ensure compliance with all requirements. We reviewed procedures used by HRB to conduct on-site inspections of permitted mining operations. Our evaluation included:

- inspection preparation,
- type and frequency of inspections,
- inspection procedures,
- inspection follow-up, and
- inspection documentation.

The following sections detail our findings and recommendations.

**There is Little or No
Documentation of Inspec-
tion Preparation**

We reviewed operating and reclamation plans, permit stipulations, prior inspection reports, annual reports, and other documentation to determine what types of information HRB personnel could obtain/analyze prior to conducting mine site inspections. We then attempted to identify type and amount of inspection preparation and/or documentation review conducted by HRB personnel prior to a mine site inspection. We believe knowledge of permit-related materials and prior inspection findings could improve the quality and comprehensiveness of the on-site visit.

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Based on our review, it appears inspection preparation varies from person to person. However, in most files, we could not readily identify any pattern of formal inspection preparation. There is little or no documentation (such as compiling a check-list/questions to be used during inspections) to demonstrate HRB personnel review permit stipulations, operating/reclamation plan requirements, or past inspection reports prior to conducting inspections. In addition, our observations of inspection activities and interviews confirmed there is minimal review of prior inspection reports and/or permit-related documentation before personnel conduct on-site inspections.

In general terms, the effect of lack of research into the mine's overall requirements lowers the quality of HRB's mine monitoring function. If personnel are not fully aware of a mine's requirements/obligations, they are not able to comprehensively assess compliance with permit mandates and/or the Metal Mine Reclamation Act (MMRA). We noted instances throughout the inspection files where HRB personnel both overlooked permit stipulations and did not follow-up on issues noted in previous inspection reports. For example, an inspection at one mine identified a potential violation from a tailing pipeline rupture. The inspector recommended specific actions be taken by the company to avoid issuance of a Notice of Noncompliance (NON). File documentation does not include information on follow-up actions conducted by HRB personnel or mitigating measures taken by the company, yet a NON has never been issued.

According to HRB personnel, analysis and/or review of a mine's inspection history and permit requirements prior to inspection is somewhat dependent upon mine familiarity and existing workload. In the past, personnel said research was time-consuming due to the voluminous nature of mine file materials, so they often just used professional judgment when conducting inspections. They also noted the ability to do research prior to inspection has improved due to the recent development of individualized inspection forms. However, based upon our review, only a limited number of the individualized inspection forms have been developed, and they do not necessarily contain

all relevant material. For example, the forms do not outline pertinent permit stipulations. Additionally, there are no formal policies in place to require personnel to prepare for inspections and/or use the newly-developed inspection forms.

On-site Inspection Frequency and Timing Need Improvement to Assure Compliance with Plans and to Protect the Environment

Section 82-4-341(1), MCA, requires each permitted mine to be inspected at least annually. Based on our review, HRB uses certain factors to determine inspection frequency including: level of disturbance, extraction and processing methods, and potential environmental hazards. For example, HRB policy implies each active mine using cyanide in its operations be inspected at least four times per year.

However, as noted by HRB management and our review, several mines did not receive any documented annual inspections during one or more of the past five years. We noted 7 of the 23 mine files reviewed did not contain documentation of at least one inspection per year.

We also noted two other mines where inspection frequency did not appear to comply with HRB policy. In addition, we identified mines where the permittee's plans and/or permit stipulations indicated earlier and/or more frequent inspections, yet these did not occur. For example, we examined mine files where plans and stipulations seemed to indicate HRB should do inspections during mine development. While inspections may have been conducted some time during the first year of operation, the timing and frequency of inspections did not appear appropriate.

The most obvious effect of HRB not conducting mandated and/or policy-required inspections is lack of compliance with section 82-4-341(1), MCA. However, the reason for doing inspections is to gain assurance permittees follow operating and reclamation plans and permit stipulations. This assurance is necessary for current and future protection and reclamation of the environment. For one mine, HRB personnel identified concerns with topsoil salvage, waste rock dump reclamation, and permitted disturbances, the effects of which may have been minimized by more frequent inspections. As a result of not

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conducting inspections earlier in some mines' development or being aware of permit stipulations, HRB was unable to prevent irreversible environmental consequences, such as loss of topsoil and water quality impacts.

In response to our findings regarding inspection frequency and timing, HRB personnel stated there are varying and sometimes compounding reasons why some mines either did not get inspected or did not get inspected as frequently as dictated by policy. These reasons include a mine's activity level, perceived low potential for environmental damage, personnel levels during our review period, competing priorities, and budget cuts. HRB has developed draft administrative rules regarding inspection frequency.

By not performing at least annual inspections of mines, HRB is not in compliance with state law and internal policy. In addition, the potential for mines to cause environmental damage and/or operate outside their permit parameters is substantially increased. In regard to inspection frequency beyond the requirement for annual inspections, HRB should consider developing and utilizing some type of formal risk analysis process. This process could include many of the factors already used by HRB personnel, but should also assess potential reclamation and environmental risks (of not conducting inspections) during mine development, operation, and closure.

HRB Lacks Consistent Management Oversight to Assure Comprehensive Inspections are Completed

HRB inspection files and observations of on-site mine inspections indicate the HRB inspection function is based upon personnel availability, individual personnel interest, and phase of mine operations. As a result, a hydrologist may conduct an inspection one year and a reclamation specialist the next year. While there are potential benefits to be derived from having varying specialists review mine operations, HRB does not have a policy or process to assure all applicable specialists inspect the site in the appropriate order. HRB also does not conduct regularly scheduled comprehensive inspections which assure review of all aspects of the operating/reclamation plans and permit stipulations.

Currently, a "lead" person is assigned to each mine and this person is responsible for assuring mine inspections are completed and applicable correspondence reviewed. The lead person may conduct the inspection or have another HRB person involved, depending upon the factors noted above. However, there is no formal policy or consistent management oversight to assure comprehensive inspections are completed. Additionally, our documentation reviews and observations indicate the individual disciplines often tend to focus on their specialties when visiting mine sites. For example, a hydrologist or engineer will examine and address issues relative to their specialty, but not consistently review unrelated mine design and/or reclamation requirements in any detail.

**Timing of On-site
Inspections does not
Always Correspond with
Mining Operations**

In addition, when there are multiple site visits during the year(s) by various personnel, the timing of visits does not always appear to correspond with mining operations. While site visits by a reclamation specialist during mine development could potentially improve topsoil salvage efforts by the permittee, inspections/visits by an engineer during mine development could be critical to the entire mine operation. At present there is no HRB policy or process to assure mines are inspected in a time/specialty sequence which consistently utilizes HRB expertise at the appropriate time. We believe HRB observations of such activities as the installation of liners, drains, clay caps, etc. could help avoid potential future environmental problems and increase mining companies' diligence in regard to permit requirements.

In response to our findings, HRB management personnel indicated timing of inspections is driven by overall workload as well as incoming activity reports. They also stated there is sufficient cross-training of staff to assure comprehensive inspections. Additionally, they believe there are enough visible effects of mining disturbances for an inspector to determine when the activity took place to not have a time/specialty sequence in inspection schedules. Our evaluation of the monitoring and enforcement functions contradict the bureau's contentions. We believe there are enough examples of inspection reports and

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enforcement actions noting questionable permittee activities which if observed by the appropriate staff member could have potentially been prevented or minimized. For example, the permittee who failed to remove the required amount of topsoil prior to mining could have been informed of this during the topsoil removal phase, instead of three years later when an HRB enforcement action was initiated and nothing could be done about the lost topsoil.

The above management approach demonstrates a reactive approach to assuring/monitoring permit compliance. By considering the use of time/specialty sequencing in mine inspections, HRB may prevent or minimize potential environmental problems. By assuming there will be visible effects of mining disturbances which can be detected after they take place, the bureau must react to the inspection finding which may not be possible to correct; rather than preventing potential problems/issues before they arise by having the appropriate inspector there during HRB-determined high-risk activities.

While we recognize HRB has multiple priorities and a finite number of personnel to address these priorities, use of comprehensive inspections and/or timing visits so applicable personnel are on-site during the appropriate phases of mine operations should be considered when developing an inspection program. If available staffing resources are a problem, it is even more important to utilize available staff effectively. Staff should prepare for inspection visits to achieve the most effective use of time. A formal risk analysis process should be developed to prioritize inspections, and time on-site visits to correspond with mining operations. This would increase regulatory effectiveness and help demonstrate efficiency to the permittee and general public.

Recommendation #7

We recommend HRB:

- A. Establish policy regarding inspection preparation to ensure effective use of staff time.**
- B. Develop and utilize a formal risk analysis process to prioritize inspections.**
- C. Implement a process to ensure inspections correspond with mining operations and utilize appropriate staff expertise.**

Documentation of Inspections is Inconsistent and Often Untimely

During our review period and currently, HRB uses a two page, triplicate form for documenting mine inspections. One copy of the inspection report is maintained in HRB files, one is sent to the mining company, and the final copy to Water Quality Division at DHES. We noted significant variances and inconsistencies in documentation of inspections and utilization of inspection forms by HRB personnel.

Inspections are documented differently by HRB personnel. For example some:

- personnel use the standard inspection form,
- forms are fully completed while others are not, and
- personnel choose to document inspections by written memorandum.

The first page of the report form is a checklist with "yes" and "no" answers. We reviewed consecutive inspection reports with different checklist answers for the same mine. These conflicting reports were usually completed by different HRB personnel; however, this was not always the case. In other instances, inspection reports noted problems or discussed needed follow-up, but did not specify how issues would be dealt with or did not identify time frames for re-inspection.

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Another concern noted with inspection report documentation was noncompliance with HRB policy regarding completion of inspection reports. Reports were to be completed within seven days of performing the inspection. We noted 15 of 23 mines (65%) had at least one inspection report signed more than seven days after the inspection date. In one file, inspection reports were completed 16 days, 38 days, 58 days, and 113 days after the inspection took place. We also noted inspection reports without signatures and/or dates of completion.

The lead person is responsible for ensuring all required inspections are completed and documented for their assigned mines. However, there are neither formal guidelines for HRB personnel to follow to ensure consistent, standardized documentation nor does HRB have a formal tracking system to help ensure timely completion of all required inspections. HRB personnel stated variances in inspection reports are caused by individual interpretations of their inspections and format of the inspection report. Delays in completion of inspection reports were caused by lack of time to keep up with paperwork requirements, according to HRB personnel.

Accurate, consistent inspection reports are critical for notifying the companies, Water Quality Division, and other regulators of inspection findings. Inspection reports are also the basis for issuing NON's, suspension orders, and/or permit revocations. Inspection reports can be used as evidence in court proceedings. Incomplete reports or lack of details on inspection activities and necessary follow-up limits assurance operation and reclamation plans are complied with. By not completing the reports within the established time frame, HRB personnel may confuse or lose valuable details of an inspection.

Communication of Inspection Visits and Results Needs Improvement

During the monitoring review, we noted HRB personnel do not always document on-site visits, and in other instances did not send inspection results to the applicable mining company. Additionally, based upon our interviews with mining company representatives, there is a perception of inconsistency in how inspection results are communicated to them. Representatives stated in

some cases HRB personnel conduct exit-type conferences and send a copy of the inspection report, and in other cases they do not hear about the inspection results either formally or informally. In addition, some mine managers did not know they were to receive copies of the inspection reports.

During our review, we accompanied HRB personnel on visits to mine sites. After reviewing file documentation, we noted several of these visits to mines were not documented. Regardless of what type of on-site visit HRB personnel make, it should be documented; not only to allow other personnel to be aware of the visit, but also for personal recollection of the reasons and outcomes. To not document inspections defeats the inspection purpose. The reason for communicating inspection results is to inform applicable parties of the results, establish an official inspection record, provide an avenue for clearing up mistakes or misconceptions, and to initiate a communication process.

The actual and potential effect of either not documenting on-site visits or not communicating the results to the applicable parties heightens the mining industry's concerns about HRB inconsistency regarding inspections. Inconsistent inspection reports, reports lacking detail, or failure to send reports may result in miscommunication of findings. Although HRB personnel stated exit conferences are normally held to discuss inspection findings, written documentation may or may not have been developed and sent. Currently, there is no active management oversight over how inspections are conducted, documented, communicated, or followed up on. Thus, there is no assurance personnel have a consistent approach to communication of inspections. HRB management officials stated there are no FTE available to specifically provide management oversight of inspectors, but they would provide additional policy guidance on completion of inspection forms.

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Recommendation #8

We recommend HRB increase management oversight of how inspections are conducted, documented, communicated, and followed up on.

Inspection Reports Often Lack Documentation of Required Follow-up Activity

During review of inspection reports, we identified potential and actual noncompliance issues noted by HRB personnel which appeared to require follow-up. We then reviewed subsequent documentation to determine what actions were taken. Of the 23 mine files reviewed, 14 files (61%) contained inspection reports which lacked documentation of follow-up, yet had findings either recommending or implying follow-up. For example, an inspection of one mine noted four items requiring follow-up relative to: cyanide test results, leach pad ore tonnage, and leach pad and stockpile construction. However, follow-up documentation was noted on only one of the four items in subsequent file information. An inspection at another mine noted three follow-up items, yet no documentation exists indicating HRB personnel conducted the follow-up.

Potential violations and noncompliance exist in both examples above. In the first situation, potential for environmental harm also exists. If the amount of ore placed on the leach pad exceeded permitted levels, structural failure could potentially occur. Leach pad failure could result in personal injury and/or harm the environment by releasing cyanide into unprotected areas. As a result, water degradation could occur. With the second example, sharp fragments and soft spots were noted under a leach pad liner. If a liner is breached, cyanide could be released into ground water, thus potentially violating the MMRA and the Water Quality Act.

At present, management has neither developed guidelines for personnel to follow nor implemented a formal tracking system

to monitor necessary follow-up. HRB personnel indicated they do not regularly review prior inspection reports to ensure issues from past inspections are re-examined, instead they rely on discussions with other personnel to make their follow-up determinations. However, based upon our review, consistent follow-up on issues noted in prior inspections does not occur. HRB officials stated they would initiate policy and procedures to assure required follow-up actions were documented and tracked.

Recommendation #9

We recommend HRB:

- A. Develop specific guidelines for personnel to follow regarding documentation of inspection follow-up activity.**
- B. Implement a formal management oversight process to monitor and ensure necessary follow-up occurs.**

Not All Operator-Generated Monitoring Reports are Reviewed by HRB in a Comprehensive or Timely Manner

All permits require operator submission of data and/or reports regarding mine operations, many of which are reclamation or environmentally oriented. These monitoring requirements can be in operating/reclamation plans or a result of permit stipulations. Depending upon operation size, permit requirements, and other factors, operator submissions range from a single page to several volumes of data and information. Based upon our review, not all data and information is reviewed by HRB in a manner which provides assurance of comprehensive or timely review.

We noted several instances where it appears HRB did not conduct sufficient evaluations of submitted data. For example, one permittee submitted water quality monitoring reports showing nitrate levels above stipulated water quality standards for 15 months before HRB personnel identified and addressed the issue.

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At another mine, HRB personnel were unsure whether permit stipulations regarding water quality were met because monitoring reports submitted by the permittee had not been reviewed in detail. At a different mine, a NON was issued because the permittee had not submitted monthly water monitoring reports as required in the permit stipulations. However, this was not brought to the attention of the permit holder for over a year, even though there was potential for contamination of adjacent water wells. There are numerous other instances of permittees submitting required data up to a year late, with no apparent awareness by HRB that data was missing.

According to HRB personnel, there is not enough time to complete other job responsibilities and review all incoming data and information in a detailed, timely manner. HRB personnel indicate a lack of resources to aid in analysis of the raw data many companies submit. Personnel have also suggested a need for HRB to require information summaries from companies which specifically state whether the company has been in compliance with all applicable requirements during the reporting period. In addition, HRB personnel stated previous FTE vacancies caused untimely review of information during our audit period. However, HRB took no action to modify reporting requirements and/or monitoring procedures.

HRB proposed rules which require permittee analysis of self-generated data. However, HRB officials believe personnel still cannot efficiently and effectively review the volumes of data submitted by permittees due to management's decision to give higher priority to statutory priorities and time frames.

Because HRB personnel do not require/review data and information submissions in a timely manner, noncompliances and violations have gone, and may continue to go, unnoticed. This increases potential for environmental harm. We believe HRB management should evaluate current procedures used to receive and review operator-submitted data to assure a comprehensive and timely review, as well as to assure operators are complying with all permit requirements.

If this review process is perceived as a lower priority, then management should at least establish a system that would ensure receipt of required reports and data; then establish priorities for reviewing information based upon significance and risk to reclamation and the environment. If staff cannot review all data, they should, at a minimum, review data from mining operations which have potential for significant impact.

Recommendation #10

We recommend HRB:

- A. Establish procedures to assure submission of operator-generated data required by HRB.**
- B. Ensure a complete analysis of data received from mining operations is conducted by HRB personnel according to established priorities.**

HRB Needs to Increase the Effectiveness of its Annual Mine Report Monitoring Process

The MMRA requires operating permit holders to submit annual reports of mining activities. The report, which is to be submitted on a department prescribed form, includes several statutory information requirements. These include updated information on corporate officers and shareholders, updated maps, amount of disturbed land, future disturbances, etc. The annual \$25 permit fee is also to be submitted with the report. During our review we identified repeated instances where annual reports were missing, required information was not submitted, or the annual reports were submitted late. In addition, we noted instances where HRB follow-up on this information appeared to be indicated, but was not initiated. The following sections discuss specific deficiencies in HRB's processing and evaluation of annual reports.

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Concerns with Annual Report Submission

We identified several concerns regarding submission of annual reports for the 23 mines in our sample. Our findings are summarized below:

- two permittees did not submit all required annual reports during our review period.
- four permittees failed to submit all required annual report information.
- three permittees did not submit all annual reports on a timely basis. Reports from these companies were submitted to the HRB anywhere from just over one year to over five years past the due date.

In the instances where permittees failed to submit annual reports or did not submit the reports on a timely basis, HRB also did not receive the \$25 annual permit fee. The omission of annual report information was not identified by HRB personnel, in some cases for several years, nor did HRB personnel follow-up on missing information. In addition, HRB was not timely in requesting submission of missing annual reports.

Lack of a Comprehensive Monitoring System

HRB's current annual report monitoring does not ensure compliance with laws and rules governing annual reporting. A list of all reports received is compiled to determine which permit holders have not submitted an annual report. With this tracking system, the potential exists for an annual report to be over one year late before being detected.

According to HRB personnel, annual reports are generally reviewed during the winter when they have time. However, we found little evidence of consistent review of this material. Omission of a report weakens HRB's ability to properly monitor a permittee's compliance with its operating permit and violates MMRA mandates. For example, one permittee submitted an annual report stating its mine was under bonded. From our review of file documentation, it appears HRB took no action to follow-up on this information. The mine appears to have remained under bonded for several years until HRB completed a

bond review and increased the bond from approximately \$1.6 million to \$6.8 million.

Various reasons were given as to why annual reports were not received or information presented was not addressed. However, the main reason appears to be lack of a comprehensive, formal process for reviewing and tracking annual reports and information submitted. In addition to lack of a tracking system, some required information is not requested. According to HRB personnel, change of ownership information is not requested with annual reports, yet the MMRA requires this information.

Current Information Requirements may not Meet Needs

We believe current information requested and/or mandated to be in annual reports does not provide HRB personnel with enough information to fully determine permit compliance. Additional and/or more detailed information on reclamation work completed, past and future disturbances, and current mine status is needed to make annual reports more useful. HRB personnel confirmed annual reports are not useful because there is not enough detail to assist in mine monitoring. However, there have been recent bureau efforts to seek changes in the information submitted by permit holders, by adding provisions to the applicable administrative rules.

Annual Report Monitoring Summary

We believe HRB needs to increase the effectiveness of its current annual report monitoring process. HRB should increase review of annual reports and conduct timely follow-up with mining companies to ensure all required and necessary information is submitted. The information submitted in annual reports should be used to properly enforce MMRA statutes, operating and reclamation plans, and permit stipulations. HRB officials concur with our findings and stated they have implemented our recommendations.

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Recommendation #11

We recommend HRB:

- A. Develop a more effective process for tracking and follow-up of annual report submissions.**
- B. Ensure all required information is in each annual report.**
- C. Evaluate information submitted to ensure it meets the bureau's needs for monitoring mine activities, and make changes as necessary.**

Overall Summary on the Effectiveness of HRB Monitoring Procedures and Activities

Our review of HRB's mine monitoring process indicates that while some mines have not received annual inspections in past years, HRB staff do conduct multiple visual examinations of those operations which they believe warrant the most scrutiny. However, we believe the monitoring procedures and process could be further improved by addressing the following:

- lack of clarity and enforceability of permit stipulations,
- lack of pre-inspection research and analysis,
- frequency and timing of inspections needs more emphasis,
- need for comprehensive and/or time-sequenced inspections,
- inspection documentation should be improved,
- inspection visits and findings should be better communicated,
- more emphasis should be given to inspection finding follow-up,
- lack of sufficient evaluation of operator-generated monitoring reports, and

-- lack of a comprehensive annual report monitoring system.

Conclusion

HRB's emphasis is not on monitoring of mining operations; even though the bureau is as statutorily responsible for monitoring existing mining operations as they are for determining whether to permit mines. We believe HRB needs a more formal monitoring process. This process should clearly define and outline what and how HRB personnel monitor mine operations in order to develop a consistent, comprehensive regulatory function. In addition, HRB should increase management oversight of monitoring activities to use available resources in the most effective way. This will help ensure the process not only complies with the statutory requirement for annual mine inspections, but also helps assure the bureau is protecting the general welfare, health, safety, ecology, and property rights of the public, as specified in the legislative findings portion of the MMRA.

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Introduction

As part of our performance audit of the Hard Rock Bureau (HRB), we evaluated the compliance enforcement process used for mines with operating permits. The purpose of the evaluation was to identify what HRB enforcement procedures are in place and to examine enforcement actions taken. We reviewed available documentation for every identified Notice of Noncompliance (NON) issued to operating permit holders from January 1989 through July 1994. The following sections describe concerns noted during our evaluation and provide recommendations for addressing those concerns.

Procedures Used for Enforcement

When noncompliance is identified, HRB may issue a NON. The NON describes the noncompliance, when the violation was noted, and what abatement is required. An abatement is an action required by HRB to reduce the impact of a violation. HRB may also assess a penalty against a permit holder as a result of noncompliance. There are several factors used by HRB to determine and calculate a noncompliance penalty including:

- history of previous violations,
- seriousness of impacts resulting from the violation,
- conduct of the permittee regarding the violation,
- permittee's good faith in reporting/correcting the violation, and
- waiver criteria.

Timeliness of HRB's Enforcement Process should be Improved

Throughout the review of enforcement actions taken by the HRB, we noted significant delays between when a potential noncompliance activity was first noted and when the bureau formally acted on the issue. We determined 15 percent of the NONs processed between January 1989 and July 1994 were not issued for at least 90 days following discovery of a violation, and another 50 percent of the NONs were issued between 30 and 90 days following violation discovery. In addition to delays in the issuance of NONs, we noted substantial time lapses between when a NON was issued and when the permittee was issued a penalty notification. Between January 1989 and July 1994, 38 percent of penalty notifications were issued more than a year

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after the NON was sent. Another 28 percent of the penalty notifications were sent between 90 and 180 days following NON issuance.

To operate a consistent, easily understandable system of enforcing permit holder compliance with the various permit requirements, we believe the system must be understandable, accurate, and timely. This means if noncompliance is noted, the permittee should be promptly notified via a NON, abatement procedures clearly outlined, and subsequent penalty assessment issued as soon as noncompliance is determined. We believe not having such a system generates confusion about HRB's regulatory role and diminishes the value of the enforcement process. Additionally, HRB's NON policy and procedures section states inspectors should ensure abatement is performed within a noted time frame, and penalty notices should generally be issued within 30 days of NON issuance.

While there is no specific policy regarding when a NON should be issued relative to the noted violation, we believe both common sense and the limited amount of time usually given to permittees for abatement suggests NONs be issued immediately upon discovery of a concern. Interviews with mining industry representatives also indicate issuance of NONs and penalty assessments should be more timely. Several representatives expressed concern and/or confusion about the compliance enforcement process due to the amount of time which passes between a HRB-noted noncompliance and the formal notification and penalty assessment.

Lack of Management Emphasis Due to Other Statutorily-Established Priorities

According to interviews with bureau personnel, there has been a lack of management emphasis placed on monitoring and compliance enforcement due to other statutorily-established priorities. In addition, personnel indicate there has not always been clear coordination with the department's legal staff in regard to NON and penalty assessment decisions. We concur not enough emphasis has been placed on compliance enforcement. This is demonstrated by existing policies and procedures which do not

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mandate timely issuance of NONs, and penalty assessments rarely issued within 30 days of NON issuance.

A compliance enforcement process should be established which ensures a timely, comprehensive, and consistent approach to permittee compliance. HRB should place more emphasis on the compliance enforcement process by revising existing policies and procedures, improving action relative to issuance of NONs and penalty assessments, and examining the role of the department's legal staff. HRB officials indicated they will place more emphasis on the timeliness of the implementation of enforcement procedures and review alternatives which may allow the process to be expedited.

Recommendation #12

We recommend HRB management improve the compliance enforcement process by:

- A. Revising policies and procedures to help ensure timely issuance of NONs and penalty assessments.**
- B. Improving actions used by HRB personnel for issuing NONs and penalty assessments.**
- C. Examining the role of the legal staff in issuing NONs and assessing penalties.**

Abatement Follow-up Actions are not Always Timely or Documented According to Policy

Each NON issued by HRB outlines specific abatement procedures and time frames which permittees are required to meet to get back into compliance with operating permit requirements. The permittee is generally given anywhere from 5 to 30 days to make the prescribed corrective action. The HRB policy and procedures section on issuance of NONs states it is the inspector's responsibility to insure the required abatement is performed within the noted time frame, and completed

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abatement documented in the compliance file with a copy of the inspection report.

During review of HRB monitoring activities as well as NONs issued to permit holders over the past five years, we identified what the required abatements were, then determined when the next formal inspection was done which could have verified the abatement. We noted six NONs issued in the past five years which were not formally followed up on within or near the abatement deadline as outlined in HRB policy. In addition, of the 42 NONs issued by HRB in the past five years at least 50 percent of the abatement follow-ups were not specifically documented in the compliance file as specified by policy.

Without timely HRB verification/follow-up of abatement by the permittee, violations may continue despite issuance of a NON. Also, without this verification, it is not possible to accurately develop a penalty assessment because inspectors cannot fully determine a permittee's "good faith" in addressing the noted non-compliance, which is a factor in the penalty calculation methodology. In addition, it is important to establish and maintain a position that HRB views all identified noncompliance as serious enough to formally verify abatement compliance. As noted in the previous chapter, we believe timing and frequency of mine inspections needs more emphasis by HRB. This is reinforced by our findings regarding lack of timely, formal HRB follow-up to the NON abatement requirements. If an HRB inspector determines there is a permit violation worthy of issuing a NON and specifying abatement requirements, they should also formally ensure the permittee has complied with those requirements. HRB officials concur with our findings and stated they will place more emphasis on follow-up procedures.

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Recommendation #13

We recommend HRB management increase emphasis on abatement inspections by:

- A. Enforcing current policy of conducting follow-up within abatement time frames; and
- B. Documenting results of follow-up in the compliance files.

HRB Lacks an Accurate, Comprehensive, and Easily Accessible System for Tracking Compliance Enforcement Actions

At present, multiple sources of information regarding HRB compliance enforcement actions exist. The bureau chief maintains a numerical listing, a bureau administrative assistant maintains an alphabetical listing, the permit files contain a "sub-file" on noncompliance, the legal staff maintains legal and litigation files, and there is an automated violation tracking report. However, our review of these information sources indicate none contain all the data needed to fully determine the bureau's enforcement activities. For example, there is no single information source which comprehensively describes what NONs have been issued or what the subsequent results were. Although the violation tracking report shows unresolved enforcement actions, it does not consistently or accurately portray all bureau or legal staff enforcement activities. In addition, the report does not include historical information about past violations for each company, which is a component to be considered in the assessment of penalties.

Currently, neither HRB nor legal staff have an accurate, comprehensive, or easily accessible system for reviewing the bureau's compliance enforcement activities. Based upon our review, there are numerous instances of NONs not readily followed up on after issuance, and delays in notifying companies of penalties. We believe lack of follow-up was partially caused by lack of a comprehensive tracking system as well as HRB

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failure to consistently monitor compliance enforcement after NON issuance.

To develop and oversee an effective compliance enforcement process, HRB and legal personnel need a tracking system which details not only what actions have been taken regarding compliance enforcement, but also what other actions are necessary to resolve pending issues. The existing automated violation tracking report contains errors, does not consistently identify abatement deadlines and does not include abatement inspection status, even though these monitoring functions are listed on the report. Without a centralized, accurate, and comprehensive data source which shows historical and active enforcement activities, historical considerations may not be factored into penalty calculations. Historical information noted on a violation tracking report would provide HRB personnel with a clear understanding of each permit holder's prior compliance with regulations. Additionally, neither department personnel nor the public can readily assess either the compliance history of permit holders, or the bureau's overall compliance enforcement activities without a more comprehensive tracking system.

At present, there are two administrative entities involved in compliance enforcement: the HRB and legal staff. Our audit evidence suggests monitoring/tracking of enforcement activities is not a priority of either the HRB or legal staff. We believe the HRB and legal staff need to analyze and evaluate the current priority given to compliance enforcement tracking and create a system which is accurate and comprehensive. The system should be used to trigger responsive department actions when either HRB, legal staff, or permittee activity is required. The department concurs with our findings and indicated increased emphasis would be placed on assuring comprehensive data entry.

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Recommendation #14

We recommend the department increase emphasis on HRB compliance enforcement by establishing a comprehensive, timely, and accurate enforcement tracking system.

Overall HRB Compliance Enforcement Philosophy Should be Revised to Provide a Forceful and Consistent Approach

During review of the HRB monitoring and compliance enforcement processes, we noted several instances where HRB personnel either did not issue NONs for problems which appeared to be in noncompliance, or recommended penalty amounts lower than what the noncompliance may have warranted based on HRB penalty calculation methodologies. For example, NONs are rarely issued for failure to submit annual report information even though permittees routinely submit late and/or incomplete information.

During review of NONs, we also looked at reasonableness of penalty determinations and subsequent penalty amounts paid. We noted only 34 of the 42 NONs issued in the past five years contained penalty calculation forms, and 29 of the 34 calculation forms included penalty calculation rationale. Without complete documentation of penalty determinations, we were unable to fully assess the reasonableness of the penalty determination process. However, we did identify examples of penalties being reduced with little or no documentation/support for the reduction. In one case, a penalty determination was reduced from \$62,400 to \$6,240 with the only documented justification appearing to be the calculated penalty was a substantial injustice.

Regulators such as HRB personnel must have flexibility to determine the level and degree of a noncompliance based on their "on the ground" assessment. However, we believe HRB should have relatively specific guidelines regarding what is and is not a problem/issue worthy of a NON and how much the penalty should be. While the MMRA states violators shall pay a civil

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penalty for any violation, it also says a penalty may be waived for a minor violation if certain conditions are met. At present, there are no administrative rules or formal policies indicating how HRB personnel should determine whether to issue a NON. In addition, while existing NON policy states a penalty may be reduced, there are no formal definitions of "unreasonable" or "substantial injustice" which are the terms HRB uses to determine penalty reductions. Also, the methodology for achieving any reduction has not been determined.

The effect of this lack of guidelines is varied. Based upon interviews with HRB personnel, the general inspection philosophy is to emphasize abatement versus pursuing a punitive approach to a violation. As a result, NONs have not always been issued on what personnel perceive as a marginal noncompliance and in other circumstances penalties have been reduced. By not establishing a formal record of all noncompliance there is potential for a company to repeat the violation and/or place less emphasis on compliance with other permit requirements. Additionally, since different inspectors often do subsequent inspections, if a NON is not issued, they may have no idea a prior noncompliance existed, and would also be unable to verify current compliance with previous abatement requirements. Additionally, if personnel do not issue a NON, they or other HRB inspectors would be unable to accurately assess the proper penalty should any future NONs be issued. In response to our findings, HRB officials outlined various criteria presently used to make enforcement action decisions and indicated they are continuing to work on policy and rule development in the area of compliance enforcement.

Recommendation #15

We recommend the HRB management provide more specific guidelines to staff regarding issuance of NONs and determination of penalties.

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Overall Summary on How Effective HRB's Compliance Enforcement Process is in Assuring Compliance with Statutes

The purpose of monitoring and compliance enforcement is to gain assurance permittees are following conditions outlined in the permit and to ensure compliance by penalizing those who violate permit requirements. To have a fully effective compliance enforcement process we believe it is necessary to have a forceful and consistent approach which is easily understood and defensible in every circumstance.

Conclusion

We believe modifications to existing enforcement practices should be considered to ensure effective compliance enforcement. This includes determination of whether NONs should be issued for any and all violations, whether penalties should be assessed for all NONs, and establishing and maintaining detailed documentation of every enforcement decision.

Agency Response

DEPARTMENT OF STATE LANDS



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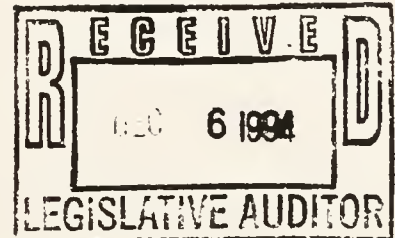
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December 6, 1994

Mr. Mike Wingard
Performance Audit Manager
Office of the Legislative Auditor
Box 201705
Helena MT 59620-1705



RE: Performance Audit of the Hard Rock Bureau (SJR28)

Dear Mr. Wingard:

The Department has reviewed the Legislative Audit performed for the Hard Rock Bureau Program and has attached its extensive detailed responses to this cover letter. A short summary of our responses (cross-referenced to the audit report) is presented below.

RECOMMENDATION #1 (p.25)

We recommend that the HRB compile and analyze more specific workload data on bureau activities to manage bureau functions and identify personnel needs.

RESPONSE: Completed. Additional data are provided in the attached detailed responses. The Department has concluded, based on the information provided in this audit report and the Department's response, that its current priorities and implementation of tasks are adequate given the resources available. Our analysis indicates that substantially more FTE would be needed to fully implement the recommendations in this audit report.

RECOMMENDATION #2 (p.28)

We recommend that the DSL re-evaluate the communication and coordination process with the DHES in regard to implementing and enforcing the MMRA, WQA, and MEPA.

RESPONSE: In process. The Department recognizes that communication and coordination are less than optimal. However, both agencies had deferred further efforts in this area until such time as the agencies' audits were complete. Now that both audits are complete the Department has initiated the effort to further develop interagency coordination efforts. The agencies are in the process of reviewing the contract and MOU to identify issues and develop timelines for resolution.

RECOMMENDATION #3 (p.36)

We recommend that the HRB

A. Comply with the additional 365 day timeframe for all adequacy reviews, or

B. Seek legislation for statutory authority to exceed timeframes in instances where adequacy cannot be determined in the additional 365 days.

RESPONSE: Completed. The applicant already has the authority to extend timeframes. However the Department has requested that the Legislature adopt additional clarifications.

RECOMMENDATION #4 (p.38)

We recommend HRB management expand management oversight to assure compliance with mine permitting statutes.

RESPONSE: Completed. The Department currently has 14 tracking systems in place and is striving to assure that the level of detail and accuracy within these systems meets bureau management needs. As noted in the detailed responses, the bureau has recently added a system to document that all permitting statutes have been complied with.

RECOMMENDATION #5 (p.42)

We recommend HRB management initiate a more comprehensive and consistent process of making, supporting, and documenting decisions.

RESPONSE: Completed. HRB uses MEPA as the standard for establishing a comprehensive consistent process for making, supporting and documenting permitting decisions. As workload and resources allow, the HRB will provide supplemental detail. The following procedures, checklists and other guidance have been developed as result of this audit, to more comprehensively document comprehensive and consistent decision making:

- . Use of a statutory checklist to document completeness more thoroughly,
- . Formal notification of mining projects to Weed Districts,
- . Revised system for tracking responses to deficiency letters,

- . Development of:
 - . stipulation tracking systems, and
 - . permit summary reports for field activities,
- . Formal procedures for writing stipulations,
- . Formal criteria for risk analysis, and
- . Additional contact with WQD.

RECOMMENDATION #6 (p.48)

We recommend the HRB:

- A. Ensure clarity, consistency and enforceability of all operating permit stipulations.*
- B. Develop and implement a formal process for reviewing permit stipulation language prior to issuance.*

RESPONSE: Completed.

- A. The Department's goal is to assure stipulations are clear consistent and enforceable.
- B. The department's detailed responses define the formal process to be used for evaluating permit stipulation detail.

RECOMMENDATION #7 (p.53)

We recommend the HRB:

- A. Establish policy regarding inspection preparation to ensure effective use of staff time.*
- B. Develop and utilize a formal risk analysis process to prioritize inspections.*
- C. Implement a process to ensure inspections correspond with mining operations and utilize appropriate staff expertise.*

RESPONSE: Completed.

- A. The Department's policy regarding inspection preparation has been previously documented in the detailed responses.
- B. A risk analysis process exists and is described in Table 7 of the Department's detailed responses and the MMRA rules.

C. Staff are assigned to inspections based on their knowledge of the operation and ongoing activities. Inspection needs have been prioritized as described in Table 7 and those priorities are balanced with ongoing statutory responsibilities and the resources available. An additional 60 or more FTE would be necessary to fully implement this recommendation as described in the associated audit text. See attached detailed responses for more detail.

RECOMMENDATION #8 (p.57)

We recommend the HRB increase management oversight of how inspections are conducted, documented, communicated, and followed up on.

RESPONSE: Ongoing. HRB has provided staff guidance on the conduct, documentation, communication and follow-up of inspection activities. Additional oversight will be implemented.

RECOMMENDATION #9 (p.57)

We recommend the HRB:

- A. Develop specific guidelines for personnel to follow regarding documentation of inspection follow-up activity.*
- B. Implement a formal management oversight process to monitor and ensure necessary follow-up occurs.*

RESPONSE: Completed. The Department has previously documented its specific guidelines for personnel to follow regarding documentation of inspection follow-up activity, and additional management oversight of inspection activities. See attached detailed responses.

RECOMMENDATION #10 (p.59)

We recommend the HRB:

- A. Establish procedures to assure submission of operator-generated data required by the HRB.*
- B. Ensure a complete analysis of data received from mining operations is conducted by HRB personnel according to established priorities.*

RESPONSE: Completed. The Department's attached detailed responses reflect the procedures adopted by the bureau to assure submission and analysis of operator-generated data.

RECOMMENDATION #11 (p.62)

We recommend the HRB:

- A. Develop a more effective process for tracking and follow-up of annual report submissions.*
- B. Ensure all required information is in each annual report.*
- C. Evaluate information submitted to ensure it meets the bureau's needs for monitoring mine activities, and make changes as necessary.*

RESPONSE: Completed. The Department's detailed responses describe the process the bureau has implemented for tracking and follow-up of annual report submissions. A new annual report form, Attachment O has been adopted to assure all required information is submitted, and annual reports will continue to be evaluated.

RECOMMENDATION #12 (p.67)

We recommend HRB management improve the compliance enforcement process by:

- A. Revising policies and procedures to help ensure timely issuance of NONs and penalty assessments.*
- B. Improving actions used by HRB personnel for issuing NONs and penalty assessments.*
- C. Examining the role of legal staff in evaluating appeals of NONs and assessing penalties.*

RESPONSE: In process. The bureau has suggested statutory language to improve the timely issuance of NONs and penalties. As a part of ongoing efforts to improve the process, the role of legal staff will continue to be evaluated and modified as appropriate.

RECOMMENDATION #13 (p.69)

We recommend HRB management increase emphasis on abatement inspections by:

A. Enforcing established policy of conducting follow-up within abatement timeframes; and

B. Documenting results of follow-up in the compliance files.

RESPONSE: Completed. Follow-up of abatement action, and supporting documentation will continue to be conducted as workload and resources allow. A new enforcement step described in the Department's detailed responses, will improve the tracking of documentation.

RECOMMENDATION #14 (p.71)

We recommend the Department increase emphasis on HRB compliance enforcement by establishing a comprehensive, timely, accurate enforcement tracking system.

RESPONSE: In Process. One of the Department's many goals is to have a comprehensive, accurate, and timely tracking system. As workload and resources allow, the existing system will continue to be expanded to meet this goal.

RECOMMENDATION #15 (p.73)

We recommend the HRB management provide more specific guidelines to staff regarding issuance of NONs and determination of penalties.

RESPONSE: Completed. This guidance has been provided in the form of rules, recently adopted by the Board of Land Commissioners. Additional guidance will be developed as needed.

In summary, the Department appreciates the management oversight that occurred as a result of this audit. The audit oversight has enabled the Bureau to rapidly identify and implement changes that may have otherwise been overlooked considering other workload priorities.

The Department, however, is disappointed that the audit did not fulfill its objective of identifying personnel needs for the Bureau. The Department held off identifying specific FTE shortfalls for the executive program planning process, knowing that a specific audit goal was to identify those needs.

I would like to emphasize that the Department knows how to run a model program when a full compliment of resources is available. This is evidenced by references that EQC (Michael Kakuk, September 1994) has made, citing the Coal and Uranium Bureau as a model program. The Department has applied that model to the Hard Rock Bureau to the extent resources and workload have allowed. With additional time and resources, Hard Rock Bureau too will be a model program.

Again, I would like to thank the audit staff for their assistance in evaluating the Bureau's program over the past year. I will be available for the scheduled combined meeting of the Legislative Audit Committee and the Environmental Quality Council on Monday, December 19, 1994.

Sincerely,

A handwritten signature in black ink, appearing to read "Arthur R. Clinch". The signature is fluid and cursive, with the first name "Arthur" and last name "Clinch" clearly distinguishable.

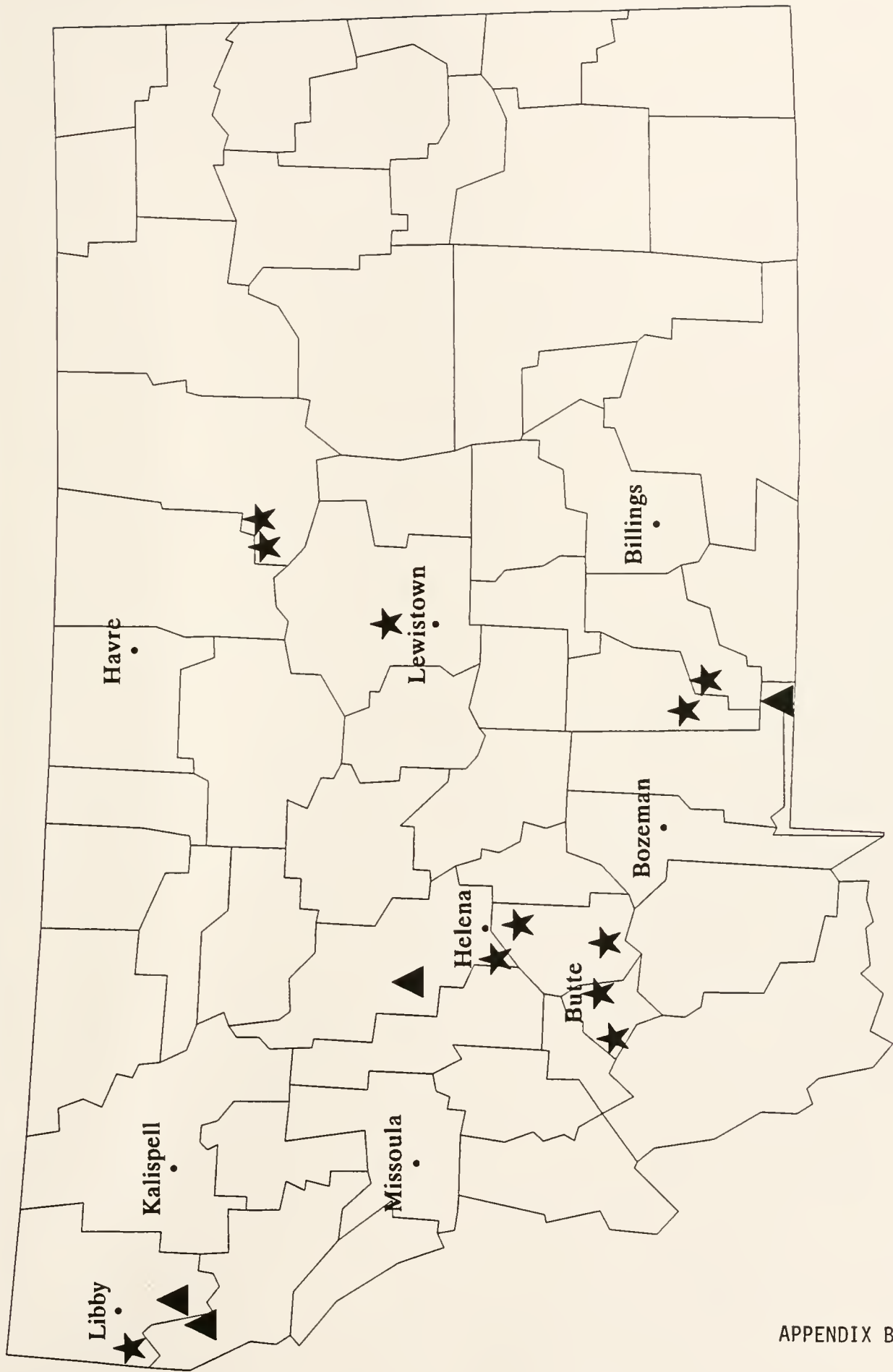
Arthur R. Clinch, Commissioner
Department of State Lands

jc

Enclosure

cc: Gary Amestoy
Sandi Olsen

Major Existing & Proposed Mines in Montana



★ - Existing Mine ▲ - Proposed Mine

